

No. 14682

United States
Court of Appeals
for the Ninth Circuit

MATTIE EDENS MEDIGOVICH,
Appellant.

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

MAY -2 1955

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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In the District Court of the United States
for the District of Arizona

No. Civ. 384 Pct.

MATTIE EDENS MEDIGOVICH,

Plaintiff,

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

PETITION FOR REMOVAL OF
CIVIL ACTION

To the Honorable the United States District Court
for the District of Arizona:

The petition of defendant, a corporation, herein-
after called "petitioner," respectfully shows:

I.

That this is a civil action brought by Mattie Edens Medigovich, as plaintiff, to recover from petitioner, as defendant, the sum of Five Thousand Dollars (\$5,000.00) alleged to be due under a policy of insurance upon the life of Joan E. Medigovich, all as more particularly appears from the true copy of plaintiff's Complaint filed herewith.

II.

That the amount in controversy at the time of commencement of this action exceeded and now exceeds the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs.

III.

That plaintiff was at the time of commencement of this action, and now is, a citizen and resident of the State of Arizona, and petitioner was at the time of commencement of this action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of California, and a citizen and resident thereof.

IV.

That the action was commenced by the filing of plaintiff's Complaint in the Superior Court of the State of Arizona, in and for the County of Yavapai, Docket No. 18,800, on the 30th day of July, 1953, all as more particularly appears from the true copy of the Summons filed herewith. Said Summons was served upon petitioner on the 6th day of August, 1953. This petition is filed within twenty (20) days after service of process. Petitioner has not moved, answered, pleaded or otherwise appeared in said Superior Court of Arizona.

V.

That, by reason of the foregoing, this is a civil action of which the district courts of the United States are given original jurisdiction and is removable to this Court.

VI.

That petitioner presents herewith a bond with good and sufficient surety, conditioned that petitioner will pay all costs and disbursements incurred by reason of the removal proceedings should it be

determined that the case was not removable or was improperly removed.

VII.

That upon the filing of this petition and the bond aforesaid, petitioner is giving written notice thereof to all adverse parties and is filing a copy of this petition with the Clerk of the Superior Court of the State of Arizona, in and for the County of Yavapai.

VIII.

That copies of all process, pleadings and orders served upon petitioner in this action are filed herewith.

Wherefore, petitioner prays that this action be removed to this Court and that said Superior Court of Arizona, in and for the County of Yavapai, shall proceed no further unless this case is remanded.

Dated this 20th day of August, 1953.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. S. JENCKES, JR.,
Attorneys for Defendant.

State of Arizona,
County of Maricopa—ss.

Joseph S. Jenckes, Jr., being duly sworn, deposes and says that he is one of the attorneys for petitioner, in whose behalf he makes this affidavit, and

that he has read the foregoing petition and that the facts stated therein are true, as he verily believes.

/s/ JOS. S. JENCKES, JR.

Subscribed and sworn to before me this 20th day of August, 1953.

[Seal] /s/ ALICE J. FITCH,
Notary Public.

My commission expires March 4, 1956.

In the Superior Court of the State of Arizona
in and for the County of Yavapai

No. 18,800

MATTIE EDENS MEDIGOVICH,

Plaintiff,

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

Plaintiff is a resident of Yavapai County, Arizona; defendant is a corporation duly organized and existing, qualified and authorized to do business in

the State of Arizona and doing business in the County of Yavapai, State of Arizona, with an agent therein upon whom service of process may be had.

II.

Heretofore and prior to the 23rd day of January, 1953, defendant herein, Pacific Mutual Life Insurance Company, insured the life of Joan E. Medigovich and agreed to pay, if the said Joan E. Medigovich died during the effective date and term of said policy of insurance the sum of Five Thousand Dollars (\$5,000) to plaintiff herein, Mattie Edens Medigovich, mother of said Joan E. Medigovich; that on the 23rd day of January, 1953, said Joan E. Medigovich died while said policy was in full force and effect.

III.

That plaintiff herein duly prepared and filed her Proof of Death of said Joan E. Medigovich as required by said policy of insurance, but said defendant has failed and refused to pay in accordance with the terms and provisions of its said contract of insurance.

IV.

Wherefore, plaintiff prays judgment against defendant in the sum of \$5,000; with accrued interest; and for such other and further relief as may be proper.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Plaintiff.

[Title of District Court and Cause.]

NOTICE OF FILING PETITION FOR
REMOVAL OF CIVIL ACTION

To Mattie Edens Medigovich, Plaintiff, and Snell &
Wilmer, Plaintiff's Attorneys:

Please Take Notice that defendant has, on the 20th day of August, 1953, filed in the above-designated court, and in the office of the clerk thereof, its petition and bond for the removal of this action to said court.

Copies of this petition and bond are served upon you herewith.

Dated this 20th day of August, 1953.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. S. JENCKES, JR.,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed August 20, 1953.

[Title of District Court and Cause.]

ANSWER

Defendant answers Plaintiff's Complaint in the following manner:

I.

Admits Paragraph I of the Complaint.

II.

Admits all of Paragraph II of the Complaint, save and except the allegation that "said Joan E. Medigovich died while said policy was in full force and effect," which allegation defendant specifically denies.

III.

Admits that plaintiff duly filed her proof of death as required by the policy and that defendant has refused to pay to plaintiff the benefits provided for thereunder, and alleges that its refusal was in accordance with the terms and provisions of said policy of insurance, as hereinafter alleged.

IV.

The contract of insurance, referred to in Plaintiff's Complaint, Group Life Certificate No. 266, was issued upon the life of Joan E. Medigovich under and subject to a master Group Life Insurance Policy No. GL-2208. The master policy was issued to a trustee for the Arizona Retail Lumber & Builders Supply Assn., Inc., Trust Fund and undertakes to insure only certain classes of employees of certain subscribing employers. The Cottonwood Lumber Company, a partnership, was a qualified subscribing employer. Under the provisions of the master group policy it is provided that where the subscribing employer is a partnership, the partners thereof shall be considered employees if and while actively engaged in the partnership business. Upon the representation that Joan E.

Medigovich was a partner actively engaged in the partnership business of Cottonwood Lumber Company, the said Joan E. Medigovich was issued Group Life Certificate No. 266.

V.

However, Joan E. Medigovich was not, when said certificate was issued, or at the time of her death, a partner actively engaged in the partnership business, or an employee of the said Cottonwood Lumber Company, and therefore the said Joan E. Medigovich was not qualified or eligible for insurance under the master group policy. By reason thereof, defendant alleges that said insurance on the life of Joan E. Medigovich was never in effect.

VI.

Defendant alleges, in the alternative and in the event the said Joan E. Medigovich was an employee within the meaning of the policy at the time of the issuance of the certificate, that said insurance terminated before her death by reason of her employment having been terminated thirty-one (31) days prior thereto in accordance with the terms of the policy and certificate providing that the insurance of the employee will terminate thirty-one (31) days after termination of employment.

VII.

Defendant alleges that, after proof of death was received by defendant and after it ascertained that said insurance on the life of Joan E. Medigovich was never in effect, a refund of Premiums was

properly tendered by defendant but refused by the plaintiff.

Wherefore, defendant prays that plaintiff take nothing by her Complaint and for such other relief as may be proper in the premises, together with defendant's costs incurred herein.

EVANS, HULL, KITCHEL &
JENCKES,

By /s/ JOS. S. JENCKES, JR.

Receipt of copy acknowledged.

[Endorsed]: Filed August 25, 1953.

In the District Court of the United States
for the District of Arizona

MINUTE ENTRY OF TUESDAY,
DECEMBER 28, 1954

Honorable James A. Walsh, United States District
Judge, Presiding.

[Title of Cause.]

The Court finds that Joan E. Medigovich, deceased, was insured by the defendant in the amount of \$5,000.00 effective July 3, 1952, as a partner actively engaged in the business of Cottonwood Lumber Co., a partnership. The Court finds further, however, that Joan E. Medigovich ceased to be actively engaged in the business of Cottonwood Lumber Co. on or about September 17, 1952, and

that her insurance terminated thirty-one (31) days thereafter, as provided by the terms of Group Policy No. GL-2208 and Certificate No. 266 issued thereunder.

Accordingly, It Is Ordered that the Clerk enter judgment herein in favor of the defendant and against the plaintiff.

(Docketed Dec. 30, 1954.)

In the District Court of the United States
for the District of Arizona

Civ. 384 Prct.

MATTIE EDENS MEDIGOVICH,

Plaintiff,

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

CIVIL DOCKET

Date: 1954.

Filings—Proceedings

* * *

Dec. 30—Enter judgment in favor of the defendant Pacific Mutual Life Insurance Company, a corporation, against the plaintiff Mattie Edens Medigovich, pursuant to order of December 28, 1954.

* * *

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Mattie Edens Medigovich, plaintiff in the above-entitled and numbered cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled and numbered cause on the 30th day of December, 1954, in favor of the defendant, Pacific Mutual Life Insurance Company, a corporation, and against the plaintiff, Mattie Edens Medigovich, adjudging that plaintiff, Mattie Edens Medigovich, take nothing by reason of her complaint.

Dated this 25th day of January, 1955.

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Plaintiff-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed January 26, 1955.

[Title of District Court and Cause.]

BOND OF COSTS ON APPEAL

Know All Men by These Presents:

That we, Mattie Edens Medigovich as Principal, and Fidelity and Deposit Company of Maryland,

as Surety, do hereby acknowledge ourselves jointly and severally bound to Pacific Mutual Life Insurance Co., a corp., Defendant, for all costs in above-entitled suit, not to exceed, however, the sum of Two Hundred Fifty & no/100 Dollars.

Conditioned, However, that the said Mattie Edens Medigovich, Plaintiff, will pay all costs that may be adjudged against her in said suit, during its pendency or at the final determination thereof, and judgment for said costs may be entered against us, and each of us, up to the full penalty of this bond, in the final judgment of this cause.

Witness our hands and seals this 4th day of March, A.D. 1955.

/s/ MATTIE EDENS MEDI-
GOVICH.

By SNELL & WILMER,
Attorneys.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

[Seal] By /s/ MARY ARME CARLSON,
Attorney-in-Fact.

THE VALLEY NATIONAL
COMPANY—INSURANCE.

Countersigned by:

/s/ M. A. CARLSON,
Agent.

[Endorsed]: Filed March 4, 1955.

In the District Court of the United States
for the District of Arizona

No. Civil 384—Prescott

MATTIE EDENS MEDIGOVICH,

Plaintiff,

vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,

Defendant.

PROCEEDINGS

Appearances:

Messrs. Snell & Wilmer, by Mark Wilmer, for
the Plaintiff.

Messrs. Evans, Hull, Kitchell & Jenckes, by Ralph
J. Lester, for the Defendant.

The above-entitled case came on for trial on the
29th day of July, 1954, in the District Court of
the United States for the District of Arizona, at
Prescott, Arizona, before the Honorable James A.
Walsh, Judge, without a jury, and the following
proceedings were had, to wit:

(The following took place in the chambers of
the Court.)

Mr. Wilmer: Prior to March, 1952, the Cotton-
wood Lumber Company consisted of three individ-

uals: Mr. and Mrs. Medigovich, who are the parents of the deceased daughter, and her brother, each owning one-third interest in it as a partnership.

About March, 1952, the brother withdrew from the partnership, that is, Mrs. Medigovich's brother, and the two Medigovich children, Joan, who was then sixteen or seventeen, and Billy, thirteen or fourteen, became members of the partnership. They had previously inherited each \$10,000 from their grandmother, I believe it was, and they purchased the interest of the brother, that is, Mrs. Medigovich's brother, who was withdrawing, and the \$10,000 was actually put into the partnership.

At that time there was a partnership agreement reached, and the attorney in Cottonwood, Mr. Norton, was engaged to prepare it.

Art Brooks of the firm of Marvin Dennis & Company is the accountant who handled it and helped her. Appropriate changes were made in the employment security records, financial statements were prepared at the bank, and income tax returns were prepared, all on a partnership basis. The daughter, Joan, previously had been working in the business to a certain extent, but subsequent to the formation of the partnership assumed further duties, made up bills at the end of the month, waited on the trade and was otherwise active in the scope of her capabilities as a partner.

The application was made under this form which has been [2*] handed to the Court for life insurance and participating in the other benefits.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

The last of September she started to attend Stanford University. While she was there, she was in communication with her parents in respect to additional property and so on; and the latter part of October, after she had been there about six weeks she suffered what was in the nature probably of a nervous breakdown. In any event, she left Stanford and returned to Cottonwood, where she again participated in the business of the partnership, waiting on the trade and so on, which continued until right after the holidays when she went to Tempe as a student. She was there for approximately two weeks, something like that, when she committed suicide, as a result, apparently, of some nervous indisposition.

Claim was made under the policy for the death benefit and it was rejected.

Mr. Lester, before I point out to the Court the pertinent provisions of the policy, did you want to make any statement as to the fact situation?

Mr. Lester: No. I think for the purposes of familiarizing the Court with the general circumstances that your statement was sufficient. I don't agree with the amount of activity you have said, but generally speaking in chronological order, those were the facts as they occurred.

Mr. Wilmer: The policy is between the Pacific Mutual [3] Life Insurance Company and Gus R. Michaels, Trustee for the Arizona Retail Lumber and Builders Supply Association, a trust fund. The term describing the employer means employer who is a member of the Association and whom the

Trustee reports in writing as accepted by the Trustee as a subscriber employer and is acknowledged in writing by the insurance company. Policy of course is meant as covering the employees of the subscribing employers, and as I understand it, the employers pay the premiums. The classes of employees eligible for insurance hereunder shall be such of the classes of employees of a subscribing employer, determined by conditions pertaining to employment as are reported in writing to the insurance company by the Trustee; provided, however, that part-time employees but not including full-time employees temporarily working on a part-time basis shall not be eligible for insurance hereunder. It is our understanding of this provision that a full-time employee who is temporarily working on a part-time basis remains eligible, but that a part-time employee as such is not eligible. Then, if any of the subscribing employers is a partnership, the partners thereof shall be considered employees within the meaning of this policy if, and while actively engaged in the business of the partnership. If any of the subscribing employers is a proprietorship, the individual proprietor thereof shall be considered an employee on the same terms as though applicable to partners of a partnership. In other words, [4] by that provision, the policy was extended to include as covered by the partners and sole proprietorships. That is the basis upon which this partnership became a policyholder.

Then there is a provision with respect to the ter-

mination of an employee's insurance. It is headed "Termination of an Employee's Insurance." This is page 3, I should have said. "Termination of an Employee's Insurance." An employee's insurance under this policy shall terminate at the earliest time indicated below; without prejudice, however, to any rights to insurance under the section entitled Extended Insurance: (a) The insurance of an employee shall terminate 31 days after termination of employment. Cessation of active work in the classes of employees eligible for insurance shall be deemed termination of employment except that while an employee is absent on account of sickness or injury employment shall be deemed to be continued until premium payments for such employee's insurance are discontinued. At the option of the Trustees the insurance of an employee may be continued during a temporary lay-off but not beyond the end of the policy month following the policy month in which the lay-off starts or may be continued during an authorized leave of absence granted by a subscribing employer for reasons other than sickness or injury but not beyond the period ending three months after such leave of absence starts. Briefly stated, it is our position that the insurance company having prepared this policy is responsible [5] for any ambiguities appearing in it, and that in accordance with the well-recognized rules of law, it would be construed against it. We believe that the provisions governing a partner becoming an insured person under the policy cannot be squared with the provision relating to employees, and such,

and that, therefore, those provisions are of doubtful validity effective. In other words, a partner cannot be laid off. You can speak of a partner as taking a leave of absence; further, there is no definition of the amount of activity which a partner must carry out in the partnership, and therefore, the general rules are appropriate and so long as a partner is not a dormant partner but participating in any fashion in the partnership business, the insurance continues. But, we say that the employee provisions do prevail. Then assuming that the Court is satisfied with the original question, then the business of the girl going to Stanford for six weeks is an authorized leave of absence which does not extend beyond the forbidden 90-day period. Likewise, the few days she attended Tempe before being subject to this attack of whatever you call it that caused her to commit suicide, is likewise an authorized leave of absence which did not extend beyond the 90-day period. In any event, if she originally became a full-time employee in a sense of being a full partner and participating fully in the partnership activities, then when she went to Stanford, since she did retain the partnership position and did remain in consultation with her [6] parents, she was then a full-time employee temporarily on a part-time basis and was covered by the policy.

I think that briefly states our position.

Mr. Lester: Briefly, your Honor, my position is that the object of this particular policy was to make available to owners of the business or proprietors

and partners, the benefits of this insurance in the same fashion and subject to the same qualifications that are provided for by the policy for employees, and in that connection there are really only three clauses in the policy which have any bearing. One states briefly that partners shall be considered employees if, and while actively engaged in the business. That only means that they shall be considered employees. It doesn't mean they shall be considered insurable per se just because they may be partners actively engaged in business. That just means they are to be considered employees. The next clause in the policy which I think is pertinent states that employees shall become insured in this fashion upon completion of three months' full-time employment. Then also the policy states that part-time employees shall not be eligible for insurance. Now, I maintain that the evidence will show that the insured, Joan Medigovich, was not an active partner in the first instance, and therefore, not entitled to be considered an employee; and the second instance, I maintain that even if she were active enough to be considered an active partner and therefore an employee, that her activity and her [7] employment in the business, being less than full time, she did not qualify as an employee to become an insured employee. Thirdly, we have an additional defense which relates to the termination of the insurance. The policy provides that upon cessation of work or activity for more than 31 days results in termination of insurance. Then that statement is followed by a statement saying that at the option of the

Trustee the insurance may be continued as to employees who are merely on leave of absence. Of course we don't have the ninety-day question here because she wasn't gone over ninety days. The point there is when she ceased work to go to Stanford in the fall of 1952 and remained away for over 31 days, she could not possibly have been active or under full-time employment. She, in effect, ceased her work and insurance practically terminated at that point and there will be no evidence to indicate that there was any option exercised by the Trustee in accordance with that term of the policy.

That briefly is my position, Judge.

(The following took place in open Court.)

GUS R. MICHAELS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer: [8]

Q. Mr. Michaels, you are the Trustee under a certain policy of insurance, a group policy of insurance of the Pacific Mutual Life Insurance Company as Trustee for the Arizona Retail Lumber and Builders Supply Association, Incorporated, trust fund, is that correct? A. Yes, sir.

Q. Do you have the original group policy with you? A. Yes, sir.

Q. Will you let me see it, please. There are

(Testimony of Gus R. Michaels.)

three policies, only one of which relates to the death benefits for Joan Medigovich, is that correct?

A. Yes.

Q. I am going to return two of them you handed me. I think only one is involved here.

(Plaintiff's Exhibit 1 marked for identification.)

Mr. Wilmer: We offer plaintiff's exhibit 1 for identification in evidence as the original group policy.

Mr. Lester: No objections.

The Court: It may be admitted.

Mr. Wilmer: I wonder if it may be agreed that we can substitute a photostat copy of that and return the original because there are many other people interested other than this particular party.

The Court: By stipulation of counsel there will be an order permitting the counsel for the plaintiff to withdraw [9] Exhibit 1 in evidence upon the substitution of a photostatic copy of the same.

Q. (By Mr. Wilmer): Under this group policy, plaintiff's Exhibit 1 in evidence, Mr. Michaels, you at all times have been the acting Trustee, is that correct?

A. Yes, sir.

Q. You are familiar with the Cottonwood Lumber Company?

A. Yes.

Q. They are members of your Association, is that correct?

A. That is right.

Q. Prior to March, 1952, were you familiar with that Company and the partnership?

(Testimony of Gus R. Michaels.)

A. Yes, sir.

The Court: Will you speak out your answers.

Q. Did you know Joan Medigovich in her lifetime? A. Yes.

Q. You knew Mr. and Mrs. Medigovich and Billy Medigovich? A. Yes.

Q. Do you have occasion in your work with the Association from time to time to call upon the various members of the Association? A. Yes.

Q. And become familiar with the business operation which they carry on? A. Yes. [10]

Q. I take it that the Cottonwood Lumber Company was a member of your Association?

A. Yes.

Q. When they first became a member of the Association, do you know who were the owners of the business?

A. When I came into the Association in 1947 they were members. At that time Mr. Frank Edens I think was the proprietor.

Q. That was Mrs. Medigovich's father?

A. That is right.

Q. Later did you learn of a change in the ownership of that business? A. Yes, sir.

Q. Do you recall when that occurred?

A. Not just exactly but I do recall that Mike and his wife took over the business.

Q. Do you remember there was Mrs. and Mr. Medigovich and do you recall that her brother, Mr. Edens, was in at that time? If you recall that.

A. I think he was, but I wouldn't be too sure.

(Testimony of Gus R. Michaels.)

Q. I am going to hand you plaintiff's Exhibit 2 for identification, Mr. Michaels, and ask you if you recollect receiving that and if you would please tell us what it is.

(Plaintiff's Exhibit 2 marked for identification.)

A. This is an application for group insurance and was [11] received by us in the regular course of business and policy number 226 was issued on July 3, 1952.

Q. Now I am going to hand you plaintiff's Exhibit 3 for identification.

(Plaintiff's Exhibit 3 marked for identification.)

Q. Plaintiff's Exhibit 3 for identification, and I ask you if that is the instrument you refer to as being issued in response to or in accordance with that request? A. Yes.

Q. That is the certificate of insurance and was issued following the receipt of this request for insurance for Joan Medigovich?

A. That is right.

Q. Were you in the association, Mr. Michaels, when this last group policy was entered into?

A. Yes.

Q. Do you recall the circumstances of that policy being negotiated; were you approached by someone from the Company?

A. Well, prior to October 3, 1950, the time we

(Testimony of Gus R. Michaels.)

took out this policy, the Association considered a group plan for smaller members of our Association who were unable to carry their own groups and we discussed insurance with many companies and finally selected the Pacific Mutual Plan.

Q. This group policy was prepared by whom?

A. By the Pacific Mutual. [12]

Q. The language used in this policy is language which was selected by that company, and this printed policy was tendered to you as the policy they would write for the Association and the group?

A. Yes.

Q. I take it you as Trustee and the group had no part in the phraseology found in plaintiff's Exhibit 1 in evidence or in selecting the words used?

A. No.

Q. Mr. Michaels, under this policy you reported to the Company the fact of the issuance of the certificate dates as they were issued?

A. As they were issued?

Q. Yes. A. No, that isn't exactly——

Q. How did it work?

A. We make an accumulation report every month of all the insurance collected from the subscribing members and turn that in in one report to the company monthly.

Q. Do you have one of such reports with you?

A. Yes.

Q. Let me see that. That will be simpler than explaining it. Do you have one, Mr. Michaels, that

(Testimony of Gus R. Michaels.)

relates just to the death or are they all reported in one?

A. There are four insurance categories under this policy [13] plan. There are 5,000, 3,000, 2,000 and 1,000. In that accumulation report we report the number of policies at 1,000; the number of policies at 2,000, at 3 and at 5. It is extended at the rate per thousand and that makes up the amount of the insurance sent in. Then, under the medical provision of the policy we have two divisions, one for dependents and one for employees, and that is calculated and goes in one.

Q. I take it you need that report for your files. I wonder if you could let us have one for illustration purposes only and I am sure counsel can agree that we can get a copy.

A. I have a working copy. I will let you have this typed copy. This is a report of July 3, the last report.

Mr. Lester: You can mark that if you want to.

The Court: That will be Number 4. There will be an order permitting counsel for the plaintiff to withdraw Number 4 in evidence upon the substitution of a copy, a photostatic copy of it, or a carbon copy.

The Clerk: Plaintiff's Exhibit 4 in evidence.

Q. Number 4 in evidence, Mr. Michaels is illustrative in the fashion in which you as Trustee reported to the insurance company the number of policies outstanding, the type of policies and the amount of premium that was payable?

(Testimony of Gus R. Michaels.)

A. That is right.

Q. You simply remitted to them the amount due the Company?

A. That is right, each month. [14]

Q. The method of determination of the employees or the persons who were eligible for insurance was left in your hands, is that correct; in other words, if you received a request such as is shown by plaintiff's Exhibit 3—I probably should offer these in evidence if they haven't been.

Mr. Lester: No objection.

The Court: That is numbers 2 and 3?

Mr. Wilmer: Yes, your Honor.

The Court: Exhibits 2 and 3 for identification will be admitted in evidence.

The Clerk: Plaintiff's Exhibits 2 and 3 in evidence.

Q. At such time, Mr. Michaels, as you received an application, such as plaintiff's Exhibit 2 in evidence, did you make the determination if the application was one which should be accepted and if they were eligible for insurance? A. Yes.

Q. Do you base that on your acquaintance with the parties and your knowledge of their operations?

A. Actually in that regard and the fact the employer pays the entire amount of insurance on employees and would naturally not fill in an application for someone unless they were employed.

Q. In other words, the employer under this program paid the entire insurance premium on the employee? A. That is right.

(Testimony of Gus R. Michaels.)

Q. I take it then, that when you received an application [15] such as this you then determined if it was in order to issue the certificate of insurance?

A. That is right.

Q. You simply reported an additional insured of that class of insurance in your next report?

A. That is right.

Q. Were you quite well acquainted with the Medigovich family, Mr. Michaels?

A. Yes.

Q. You were aware then, of course, of the relationship when Joan became a partner, I presume?

A. Yes.

Q. Do you recall at any time whether or not Mr. and Mrs. Medigovich discussed with you that Joan might attend Stanford?

A. Actually I don't recall any such.

Q. Whether she did or not?

A. No, I don't.

Q. Mr. Michaels, did you have any objection as Trustee to her attending Stanford under a mutually agreeable arrangement with her other partners?

Mr. Lester: That is objected to as immaterial. I think what Mr. Wilmer is driving at concerns this option provision and I don't think the question really can be asked what he might have done or would have done at the time the opportunity arose to exercise the option unless there is a [16] showing that there was an opportunity to exercise the option and he did exercise the option. It certainly can't be asked if he did or in what manner he would have been inclined to exercise the option in the past.

(Testimony of Gus R. Michaels.)

Mr. Wilmer: I meant only briefly to say this: I do not believe that the provision with respect to leave of absence is related to the Trustee's exercise of his option. I think that is related solely to the temporary lay-off and that the further provision that it might be extended for a three months period, or not to exceed three months beyond a leave of absence, requires a leave of absence authorized by the employer, and that the Trustee would have no discretion or option in relation thereto as employer. Should the Court take a contrary view, I desire to show from this witness and offer to prove by this witness that if Mr. and Mrs. Medigovich had advised him they intended to give Joan, or permit Joan to go to Stanford, that he would have been entirely agreeable that she do so so long as the premium is paid, because I don't believe the insurance company can exercise the option, or can they at this time elect to exercise an option not to continue the insurance if the Trustee is not desirous of so doing and is prepared to say he ratifies that the leave of absence be given and he does accept the premiums during that period of time.

Mr. Lester: May I say this: The clause in the contract we are talking about is perfectly clear. It states [17] that at the option of the Trustee the insurance may be continued during the leave of absence, and Mr. Michaels has already testified that he did not know about this girl having gone to Stanford or that she was going to go. There is no evidence that he knew about any proposed leave of

(Testimony of Gus R. Michaels.)

absence, and now Mr. Wilmer is asking him to state what his position would have been had he known that the girl was going away on an alleged leave of absence.

The Court: I have some doubt about its admissibility. I am going to let it in because I can later determine if it is not proper and disregard it. My view is possibly a general policy on the part of the Trustee to let employers give such leave of absence as they might desire consistent with the insurance remaining in force. That might be admissible. I have a great deal of doubt what he would have done if it had been brought to his attention; but I am going to let it in.

Mr. Wilmer: So that the record will not appear that way, to correct Mr. Lester's statement of Mr. Michaels' testimony: he did not testify that he did not know about it. He testified that he did not remember any discussion with the Medigoviches, and I believe they will testify they did discuss with him that she was going to Stanford.

Q. (By Mr. Wilmer): Mr. Michaels, may I ask this question then: With respect to partners and with respect to the matter of insurance remaining in force with respect to employees on a [18] leave of absence if the employer continued to pay the insurance premiums during an allowable period of absence, did you have any reason or cause for not agreeing to that?

Mr. Lester: I object to that on the same grounds.

The Court: Same ruling.

(Testimony of Gus R. Michaels.)

A. Actually that is more a determination of the employer. As long as the bills go out every month as they do and the insurance is paid every month I have really no way of knowing a man is on leave or not.

Q. I take it as a matter of general policy so long as the employer is satisfied to pay the insurance premiums, you would be quite agreeable to going along that the insurance remain in force?

A. Oh, yes.

Cross-Examination

By Mr. Lester:

Q. By the same token, Mr. Michaels, if an employer should elect to continue to pay premiums and carry a person on the payroll or the insurance program even though the employee may have quit work a year or two years in the past, you would have no way of knowing that and you would have no objection to continuing the premiums, would you?

A. I don't know how I would know.

Q. In fact, you don't know, do you, unless you are specifically advised about persons who are dropped from the [19] payroll from the employee or partnership status?

A. That is right.

Q. Or advised as to any leaves of absence or sick leaves and things of that kind?

A. Yes.

Q. You have to rely on the employer to inform you the status of the people that are insured under the plan in their establishment?

(Testimony of Gus R. Michaels.)

A. Yes, I mean there has been—they don't inform me of anything; they just pay the premiums. I am not asked anything.

Q. When these premiums are paid you assume they are being paid in accordance with the policy provisions? A. That is right.

Q. You do not go out to check and see that every employee is actually working? A. No.

Q. At that particular establishment?

A. No.

Q. The only link between the insurance company and the persons who are insured, the employers and the employees, as I understand it, is yourself?

A. That is right.

Q. The master policy, of which there is only one, is issued to you, is that correct?

A. To the Association and I am the Trustee. [20]

Q. To you as Trustee for the Association?

A. That is right.

Q. That policy covers—correct me if I am not right on this—all those who are members of the Association and their employees who are qualified for insurance, is that correct? A. Yes.

Q. And who are issued certificates?

A. Yes.

Q. In the case of Joan Medigovich she became insured when she was issued a certificate. Does a certificate indicate when?

A. You have the application card up there, your Honor.

The Court: Exhibit 3 has an effective date on it.

(Testimony of Gus R. Michaels.)

A. Up in the corner of the card you will see the number and the date on which it was issued.

Q. That would be July 3, 1952, is that correct?

A. Yes.

Q. When did the Cottonwood Lumber Company, the employer, subscribing employer, become a subscribing employer?

A. When the plan first went into operation, October 3, 1950.

Q. In other words, Joan Medigovich was issued a certificate some considerable time after the Cottonwood Lumber Company became a subscribing employer? [21]

A. That is right.

Q. The two didn't become insured simultaneously?

A. No, she came in later.

Q. Who actually issues the certificate?

A. We do in our office.

Q. When you say "we," you mean you as Trustee for the Association?

A. That is right.

Q. The Company then, I understand gives you the certificates in form and you make them out and deliver them to the various applicants?

A. That is right.

Q. The application goes directly to you in the form of Exhibit 2?

A. Yes, sir.

Q. That is all you get, is it not, when someone wants to apply for insurance under this plan, that little request?

A. Yes.

Q. Immediately upon receipt of that request you then issue a certificate, is that correct?

(Testimony of Gus R. Michaels.)

A. Under the regulations of the company, they make an application, send in the application card at any time by the employee and must be in ninety days, and it is issued at the end of ninety days.

Q. You wait ninety days in accordance with the policy [22] before issuing the certificate?

A. That is right.

Q. Ninety days after you get the request?

A. It may come in any time during that period.

Q. From then on the only thing you get from the employers is the blue tally sheet, Exhibit Number 4?

A. We don't even get that. We have a big supply of them and we make them out every month.

Q. That is plaintiff's Exhibit Number 4?

A. Yes, sir.

Q. You don't receive this; you make it out in your own office?

A. We receive these in a big supply and make them out every month.

Q. You actually make it out and it is not made out for you; the insurance company doesn't make it out?

A. I make it out myself.

Q. All you do with that exhibit Number 4 is simply calculate the number of persons that are covered within that period of time, is that right?

A. Well, the number of persons and the amount of insurance for each category.

Q. And the amount of premiums involved?

A. That is right. This is a recapitulation of what it is.

(Testimony of Gus R. Michaels.)

Q. Do you send that report to the insurance company? [23] A. With a check, yes, sir.

Q. Is that the only thing that the insurance company ever gets from you? A. Yes.

Q. So, as far as the insurance company, they only know the number of persons that are covered?

A. That is right.

Q. And the amount of premiums they are receiving from you? A. That is right.

Q. For a given period of time?

A. That is right.

Q. Do you know, Mr. Michaels, that Joan Medigovich went to Stanford University in the fall of 1952? A. No, I did not.

Q. Did you know she was going to go?

A. I wouldn't say positively. I would say I have known the Medigovich family many years, and well, I visit at their home. I have talked to the kids and we have talked about my kids and that. It may have come up in the conversation.

Q. It didn't come up formally in connection with the policy? It didn't come up that way?

A. Actually I don't remember anything like that.

Q. You don't have any official record of any such notification that shows she was going to go to Stanford or that she did go? [24]

A. Not one way or the other.

Mr. Lester: I believe that is all.

(Testimony of Gus R. Michaels.)

Redirect Examination

By Mr. Wilmer:

Q. Mr. Michaels, plaintiff's Exhibits 1, 2, 3 and 4 were all supplied you by the Company?

A. Yes, sir.

Q. The language contained in them was language the Company selected? A. Yes, sir.

Q. The information which you required to obtain before issuing a policy was the information which is set forth on this request for insurance?

A. Yes, sir.

Q. This report which you sent in, plaintiff's Exhibit 4, that was on the form furnished you by the Company? A. Yes, sir.

Q. Did you have any request from the Company at any time to supply any additional information?

A. No, sir.

Q. Did you have any further instructions from the Company as to what they wanted in the way of information in connection with the issuance of any of these certificates? A. No, sir.

Q. Did you have instructions from the defendant Company, Mr. Michaels, as to the yardstick you were to apply in [25] determining if a partner, for instance, was a partner eligible for insurance?

A. No, sir.

Q. I believe that at the same time Joan applied for insurance that her younger brother, William, applied for insurance? A. That is right.

(Testimony of Gus R. Michaels.)

Q. And his application card shows that he was then 12 or 13 years of age?

Mr. Lester: I object as immaterial. I don't see how someone else's insurance can have any bearing on this case.

The Court: Objection overruled. The card is the best evidence.

Q. Do you have the application card with you in the Medigovich file?

A. Yes, sir. May I have that back later on?

Q. May we substitute a copy of that?

Mr. Lester: Perfectly all right.

The Clerk: Plaintiff's Exhibit 5 for identification.

Q. Referring to plaintiff's Exhibit 5 for identification, was that request for insurance filed with you at the same time and was a certificate of insurance issued at the same time Joan Medigovich received her insurance policy?

A. Yes, certificate Number 267, dated July 3, was issued at the same time.

Q. This shows that Billy was born the 6th day of April, 1939? [26] A. Yes.

Q. You have been accepting premiums from the Cottonwood Lumber Company on Billy Medigovich and are accepting them today? A. Yes.

Q. And have been accepting them since the death of Joan, and the Company became apprised as to her efforts——

A. On Billy continuously since we issued the policy.

(Testimony of Gus R. Michaels.)

Q. As of today? A. That is right.

Q. Has the Company ever told you since they rejected Joan's claim that you ought to stop accepting premiums on Billy? A. No, sir.

Q. Have they ever told you you are not to accept premiums on any partners that are not of full age and an adult person? A. No, sir.

Mr. Wilmer: That is all.

The Court: Has this been offered?

Mr. Wilmer: If I did not, it is an oversight and I do so at this time.

The Court: Number 5 for identification.

Mr. Lester: I have no objection.

The Court: It may be admitted. There may be an order that exhibit 5 in evidence may be withdrawn by counsel by substitution of a photostatic copy of the same.

Q. (By Mr. Wimer): Gus, did you have occasion to attend [27] various lumbermen's conventions? A. Yes, all of them.

Q. Do you recall seeing Joan there as a partner of the Cottonwood Lumber Company?

A. Yes.

Q. Attending the convention as a representative of her Company? A. Yes.

Q. Did she have a tag on? A. Yes, sure.

(Testimony of Gus R. Michaels.)

Recross-Examination

By Mr. Lester:

Q. When was this convention you told us about?

A. Back to 1947. We had conventions in '47, '48, '49, '50, all through there. Mike and Mattie have come to the conventions.

Q. Where is this convention held each year?

A. In different places.

Q. In Arizona? A. Yes.

Q. You have seen Joan at most of those conventions even as far back as 1947?

A. Back in that neighborhood.

Q. You realize that she wasn't a partner then?

A. It was immaterial.

Q. In other words, she was down there with her mother and father? [28] A. Yes.

Q. She didn't go to the convention alone as the sole representative of the Cottonwood Lumber Company; you don't mean to suggest that?

A. No.

Q. Her younger brother was probably there at these conventions from year to year along with them, was he not? A. That is right.

Q. Again with his mother and father?

A. Yes.

Q. Did Joan take the floor at any of the conventions?

A. I don't remember, but I don't think so.

Q. Did she accomplish any business at these conventions that you know of?

(Testimony of Gus R. Michaels.)

A. A lot of business was accomplished at these conventions; I wouldn't know.

Q. You didn't see her performing any duties?

A. No.

Q. At these conventions? A. No.

Q. As far as you know she was there only because her parents were there? Just socially?

A. I wouldn't know at all times but——

Q. As far as you know?

A. She went with her parents, yes. [29]

Q. With regard to this exhibit, plaintiff's Exhibit 5, which is the application of the request for insurance for Billy Medigovich, who at that time was only 12 or 13 or 14 years old, I ask you again—this card is made out by the applicant in this case, Billy Medigovich, is that correct?

A. Yes, sir.

Q. He or his employers sends it to you, is that correct? A. That is right.

Q. What happens to that card after it comes to your office?

A. We make out the certificate, send it to him and file it.

Q. What happens to the card showing how old he is? A. Nothing.

Q. It stays in your office, doesn't it?

A. That is right.

Q. It never goes to the insurance company?

A. That is right.

Q. They don't know how old Billy is?

A. Yes, once a year the insurance representative

(Testimony of Gus R. Michaels.)

goes through the complete files and takes the age and the amount of insurance of each; some time prior to October, the anniversary date. Every year that is done.

Redirect Examination

By Mr. Wilmer:

Q. When this representative of the Pacific Mutual goes through these cards, did he ever come back to you and criticize or direct that you shouldn't accept that type of company as an [30] insurer?

A. No.

Mr. Wilmer: That is all. I have two or three witnesses not exactly in point that I would like to put them on so I can excuse them.

The Court: Do you want to excuse Mr. Michaels?

Mr. Wilmer: Yes.

Mr. Lester: No objection.

The Court: You may leave, Mr. Michaels.

JAMES F. HAMIL

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Will you state your residence and occupation, please?

A. My name is James F. Hamil. I reside in Phoenix, Arizona, and am employed by the Employment Security Commission of Arizona.

(Testimony of James F. Hamil.)

Q. You were served with a subpoena duces tecum for you to produce certain records of the Employment Security Commission? A. Yes.

Q. These are in your custody?

A. That is right.

Q. I understand under the rules and regulations that there [31] is in your mind and in the mind of the Commission some limitation upon the right to disclose the contents of the record unless ordered by the Court? A. That is right.

Q. It is your request before you be asked to testify with regard to the contents of these records, even though the employer is agreeable, that the Court direct you to do so?

A. I would appreciate that.

Q. I believe, your Honor, there is some question that unless the Court orders the witness to divulge the information in the reports——

The Court: The Court will order Mr. Hamil to produce any records or other documentary records in his custody which may be pertinent and material in this case.

Mr. Hamil: Thank you.

Q. Have you brought with you the file of the Cottonwood Lumber Company? A. Yes, sir.

Q. That is the file of the Employment Security Commission? A. That is correct.

Q. Does that file contain any reports with respect to the formation of a partnership consisting of Mr. and Mrs. Mike Medigovich and their two children? A. It does.

(Testimony of James F. Hamil.)

Q. Will you segregate that material for me, please? May the [32] record show that Mr. Hamil has handed me a letter, upon the letterhead of H. Marvin Dennis & Company, Certified Public Accountants, together with an employment status report from his file, which we ask be marked for identification?

The Clerk: Plaintiff's Exhibit 6 for identification.

Q. Mr. Hamil, how long have you been with the Employment Security Division?

A. Since March, 1938.

Q. Under the Employment Security Law of the State of Arizona, an employer is required to file a status report at such times as there is a change in the employer's legal status, is that correct?

A. That is correct.

Q. So that you have as part of your records the correct legal entity of who is the employer?

A. That is correct.

Q. Handing you Plaintiff's Exhibit 6 for identification, I will ask you if this is the record filed April 17, 1952, of a change in the employer's status of the Cottonwood Lumber Company?

A. It is. The status report was filed April 17th, April 11, the letter was dated April 17th.

Q. Does your file show the employer which preceded the new partnership employers immediately prior to this change? A. Yes, sir. [33]

Q. Without taking that out of your file, unless

(Testimony of James F. Hamil.)

counsel requests it, will you tell us who according to your records the preceding or previous employer was to the change in status reflected by plaintiff's Exhibit 6 for identification?

A. To March, 1952, my records show it was a business conducted as a partnership composed of Mr. M. S. Medigovich, J. F. Edens and Mattie Edens Medigovich.

Q. And that change was made March 1, 1952?

A. That was the effective date of the change.

Mr. Wilmer: We offer in evidence plaintiff's Exhibit 6 for identification.

Q. May I ask one further question. Subsequent to March, 1952, and through the first months of 1953, was there any change in the employer's status report as filed with your Commission?

A. I have been informed there was a change at the end of January, 1953.

Q. Do you have an employer's status report reflecting that change? A. I do.

Q. That was as of the end of January, 1953?

A. That is correct.

Q. Did it show why the change in status, or just a change in status?

A. I don't believe it shows why. It shows a change since February 1, 1953, is shown to be a partnership, M. S. Medigovich, [34] M. E. Medigovich and W. M. Medigovich.

Q. That status has continued until the present time? A. So far as I know.

(Testimony of James F. Hamil.)

Mr. Lester: I have no objection to plaintiff's Exhibit 6.

The Court: It may be admitted.

The Clerk: Plaintiff's Exhibit 6 in evidence.

Cross-Examination

By Mr. Lester:

The Court: Do you want an order on Exhibit 6?

Mr. Wilmer: I presume you would like to have it back?

Mr. Hamil: I would like to have it back or copies of it.

Mr. Wilmer: If counsel is agreeable we will undertake to make a copy and substitute it if it is agreeable.

Mr. Lester: All right.

The Court: There may be an order permitting the withdrawal of Exhibit 6 in evidence by counsel for the purpose of the substitution of a copy.

Q. (By Mr. Lester): You do not know, do you, Mr. Hamil, whether or not or to what extent, Joan Medigovich may have been active in the Cottonwood Lumber Company? A. I don't know the lady.

Q. You wouldn't have any idea if she worked there or not? A. No.

The Court: Do you want to excuse Mr. [35] Hamil?

Mr. Wilmer: Yes.

The Court: You may leave if you desire.

Mr. Lester: That is all right.

ARTHUR H. BROOKS

called as a witness herein, having been first duly sworn, testified on his oath as follows:

Direct Examination

By Mr. Wilmer:

Q. Your name is Mr. Arthur Brooks?

A. That is right.

Q. What is your occupation?

A. I am a public accountant with H. Marvin Dennis & Company in Phoenix.

Q. Were you with them in 1952?

A. Yes, sir.

Q. And continued up to this time?

A. That is right.

Q. Did you have occasion in connection with your employment with Mr. Dennis to do certain accounting work for the Cottonwood Lumber Company?

A. I did.

Q. When did you first take over that account?

A. At the time Mr. and Mrs. Medigovich and Joan and Billy bought out the J. F. Edens interest in the partnership.

Q. Were you familiar with that [36] transaction?

A. I was.

Q. Do you recall what it was?

A. Well, yes, I do. Prior to the time that it was a partnership, prior to that time consisting of Mr. and Mrs. Medigovich and Mr. J. F. Edens, then along in, I think it was in January, 1952, they bought out Mr. Eden's interest.

(Testimony of Arthur H. Brooks.)

Q. Do you know the source of money that was used to buy out Mr. Eden's interest?

A. It came from three places. Part was money in the Company; part was money that belonged to Mr. and Mrs. Medigovich prior; part they borrowed from a gentlemen, I can't think of the name but it is immaterial; and part belonged to Billy and Joan.

Q. Do you know of the source of money that Billy and Joan put in the business?

A. I do.

Q. What was that?

A. It came from Mrs. Medigovich's mother, Mrs. Frank Edens.

Q. It was an inheritance from the grandmother?

A. That is right.

Q. Do you know the amount of that, or do you recall?

A. It was approximately \$10,000, I believe or it might be a few dollars one way or the other. I can't exactly recall.

Q. At that time, the later part of March, 1952, these two minor Medigovich children invested all their own money, [37] around \$20,000, in the Cottonwood business?

A. That is right; it was my suggestion they do this. Prior to that time Mr. and Mrs. Medigovich wanted them to put it in as a loan and they were going to repay them, but I suggested they form a family partnership consisting of themselves and the two children.

Q. Did you participate any in the arrangements

(Testimony of Arthur H. Brooks.)

with respect to what the understanding of the partnership would be? A. Yes.

Q. Was there any agreement as to the amount of work which the children would do?

A. None other than they were supposed to devote their time when they were home from school to the business.

Q. Did you have occasion, Mr. Brooks, to be there from time to time? A. I was.

Q. That is in 1952?

A. That is right.

I was in the Lumber Company practically every month, in the office I mean. I would go in and visit.

Q. Did you have occasion to notice the amount of work that Joan did about the business?

A. At the times that I visited the office of the Cottonwood Lumber Company, usually she was there doing work.

Q. In the office? [38]

A. In the office, that is right.

Q. What type of work was she doing?

A. Always clerical work.

Q. Making records and——

A. Checking extensions on the sales slips and one thing or another.

Q. Did you have occasion to prepare the income tax return for the partnership?

A. Yes, I did.

Q. Do you have copies of those as filed?

A. I have.

Q. Will you let me see them, please? Under the

(Testimony of Arthur H. Brooks.)

income tax laws, is it required when a partnership terminates that notice be filed with the Internal Revenue Department of that termination, setting up the partners?

A. The partnership is required to send to the Social Security Division the identification number, but the final return on the predecessor's partnership is marked final, and of course, all payroll reports are marked final.

Q. You have those reports with you, or copies of them, of the final partnership return of the Medigovich and Edens partnership? A. Yes, I do.

Q. Will you let me have that copy of the partnership return for 1952? [39]

A. This is a copy of the first return beginning in February of '52. This is the first return of the new partnership.

Q. That includes also——

A. This is a copy to the State of Arizona. This is a copy of the final return consisting of Mr. and Mrs. Medigovich. I am sorry, this is the final return of the partnership that Joan was in. This is the copy of the final return at the time that J. F. Edens' interest was purchased.

Q. This closed out the old partnership of J. F. Edens and Mr. and Mrs. Medigovich?

A. That is right.

Mr. Lester: No objection to either 7 or 8.

The Court: They may be admitted.

The Clerk: Plaintiff's Exhibits 7 and 8 in evidence.

(Testimony of Arthur H. Brooks.)

Q. Did you have occasion, Mr. Brooks, to prepare a financial statement? A. I did.

Q. Do you have copies of any of those papers?

A. This is one at the time that Joan was in the partnership, that we sent to the Lumbermen's Credit Association in Chicago.

Q. That was prepared by you from your knowledge of the partnership affairs and business gains as their accountant?

A. That is right. Here is the copy we prepared for Medigovich and the two children on August 31, 1952, at the [40] time Joan—after Joan and Bill had been in the partnership. They were on a fiscal year ending August 31st.

Q. This is the financial statement showing the respective partner's interest?

A. That is right. You will notice we adjusted their investments to \$10,000. They withdrew the amount over that amount so that each had \$10,000 at that time.

The Clerk: Plaintiff's Exhibits 9 and 10 for identification.

Mr. Wilmer: We offer Exhibits 9 and 10 for identification in evidence.

Mr. Lester: I have no objection to 9.

The Court: 9 may be admitted.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(Testimony of Arthur H. Brooks.)

Cross-Examination

By Mr. Lester:

Mr. Lester: I have no objection to 10.

The Court: 10 may be admitted in evidence.

The Clerk: Plaintiff's 10 in evidence.

Q. (By Mr. Lester): Mr. Brooks, showing you this exhibit——

A. I think he marked them on the back, but I wouldn't be sure.

The Clerk: This is plaintiff's 8.

Q. It is in evidence?

The Clerk: It is in evidence.

Q. Showing you plaintiff's Exhibit 8 in evidence, which I [41] believe you have identified as a partnership income, United States income return?

A. That is correct.

Q. That is for what period?

A. From September 1, 1952, to January 31, 1953.

Q. The return is for how many individuals as partners? A. Four.

Q. Four? A. That is right.

Q. Who are they?

A. M. S. Medigovich. M. E. Medigovich, Joan Medigovich, William M. Medigovich.

Q. They are listed at page four?

A. Page four of the Federal return.

Q. Calling your attention to Schedule K on page four of that return, there is a list of four partners which you have just read off?

(Testimony of Arthur H. Brooks.)

A. That is right.

Q. The first column next to the list of the names of the partners is for what purpose?

A. It is to designate the percentage of time devoted to the business.

Q. What is designated there for Joan Medigovich?

A. That she devote part of her time to the business.

Q. What is designated for Mr. and Mrs. Medigovich? [42]

A. That they devoted all their time to the business.

Q. I believe you stated that you customarily went to Cottonwood on business; how often, how frequently?

A. Every month.

Q. Once a month?

A. That is right.

Q. You would be in town overnight?

A. Sometimes as much as a week; usually as much as a week. The fact is I stay with the Medigoviches sometimes at their house.

Q. Do you know whether or not Joan was working anywhere else other than at the Cottonwood Lumber Company?

A. I don't know. I heard some information about that but I don't know what amount.

Q. In other words, you would not see enough of her to know whether or not she had any other job in town or any job at all, is that right?

A. I know in trying to get Social Security she

(Testimony of Arthur H. Brooks.)

had some other jobs but it was just about the time she got in the partnership.

Q. You didn't see enough of her to observe her activities?

A. Seeing her a week of a month, that is all I can testify to. The other three weeks I couldn't.

Q. A great part of the time she was in school no doubt?

A. Part of the time she was. She had been to Stanford. [43]

Q. When did you take over as the accountant for the Cottonwood Lumber Company?

A. After Medigovich bought out J. F. Edens' interest.

Q. That was in February or March of 1952?

A. No, it was prior to that. It would be——

Q. 1951?

A. No, along in January of '51, I believe.

Q. January of '51?

A. 1952, it might be. I can't tell without the papers relative to the exact dates.

Q. Did you have occasion to observe or notice or pay any attention to whether or not Joan was in high school or another school of one kind or another around Cottonwood?

A. I know she was. I talked with her and we discussed what she was doing in school at different times.

Q. She did go to school? A. That is right.

Q. You don't mean to imply each time you went

(Testimony of Arthur H. Brooks.)

there on your visits to Cottonwood that she was working whether it was during school or not, at the Cottonwood Lumber Company?

A. Well, usually in the afternoons sometimes she would be there. I wouldn't say that each time I went to Cottonwood that I saw Joan in the office.

Q. Did you notice whether or not she was there at any time seemingly performing one kind of duty or another before she became a partner? [44]

A. I don't recall that she was ever in the office prior to that time and I was just visiting there occasionally; I had no business there.

Q. When was the first time, Mr. Brooks, that you noticed she was doing some kind of work in the lumber business? A. I wouldn't recall.

Q. It may have been 1951, is that right?

A. It might have been, that is true.

Q. Did you become acquainted with the Medigo-viches for the first time in January of 1951?

A. I had known them prior to that time.

Q. About how long?

A. I guess I have known them twelve to fifteen years.

Q. Haven't the kids always been in and around the lumber office there as long as you can remember?

A. No, I don't think that they were. I can't say definitely.

Q. Aside from school hours, didn't you ever see them in and around the business?

A. I might have seen them walking through the

(Testimony of Arthur H. Brooks.)

lumber yard. I wouldn't say definitely; I don't know.

Q. Where was the Medigovich residence with relation to the lumber business?

A. It is right in the next street. You can go through the lumber yard in the back way to the Medigovich home.

Q. The residence and the business are [45] together? A. Yes.

Mr. Lester: That is all.

The Court: Do you want to excuse Mr. Brooks?

Mr. Wilmer: Yes.

The Court: You may be excused.

MATTIE EDENS MEDIGOVICH

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. You are Mattie Edens Medigovich?

A. Yes, I am.

Q. The plaintiff in this action. Your husband is sitting here beside me? A. Yes, sir.

Q. How long have you been married to him?

A. Twenty-one years this August.

Q. How long have you lived in Cottonwood?

A. Since 1922.

Q. I take it that you have raised your family there and have grown up there yourself?

A. Yes, sir.

(Testimony of Mattie Edens Medigovich.)

Q. Prior to the time that you were married to Mr. Medigovich, was your father in the lumber business?

A. Yes, sir. [46]

Q. Has been for many years?

A. Yes, sir.

Q. His name was Edens?

A. W. F. Edens.

Q. After you and Mr. Medigovich were married, did you go into the lumber business also?

A. Yes, sir.

Q. Did you assist your father in the business while you were living with him?

A. Yes, sir.

Q. When did your father retire from actively participating and managing the lumber yard?

A. 1951, January, 1951; not from active management; excuse me, I will correct that. He retired from part ownership in 1951. He had not been in the management of the lumber yard for some time.

Q. Then in 1951 he got out entirely?

A. Yes.

Q. And who took his place?

A. My husband and I and my brother.

Q. J. F. Edens? A. J. F. Edens, yes.

Q. You operated that as a partnership?

A. Yes.

Q. In January, 1952, did your brother desire to withdraw [47] from the partnership?

A. Yes, sir.

Q. You heard Mr. Brooks' testimony with respect to the formation of the new partnership?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir.

Q. Do you recall the preparation of the partnership agreement, Mrs. Medigovich?

A. Yes, sir. We talked about it with Mr. Norton, our attorney in Cottonwood.

Q. Mr. K. Norton, the attorney in Cottonwood?

A. Yes, sir.

Q. Did you go over with him the terms of the agreement and how it was to be prepared?

A. Yes, sir.

Q. Do you recall whether or not it was actually ever reduced to final, formal writing?

A. No, I don't, but I knew it was our understanding that we certainly understood how it was supposed to be.

Q. What interest did Joan and Billy have in the business?

A. That had to be figured out by Mr. Brooks from the amounts of money to put in the business.

Q. Their participation was in relation to the amount of money they put in as against the over-all evaluation of the business, is that correct?

A. Yes, sir. [48]

Q. Prior to the time when this partnership was formed, had you had a policy or subscribing policy with the Pacific Mutual?

A. Yes, sir, I did.

Q. Did your father?

A. Yes, my father did also.

Q. At one time did you then cancel it as to your father?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir. When my father became inactive in the business, I wrote and cancelled the payments because we didn't want to pay on somebody that wasn't naturally an employee.

Q. When he dropped out of the business you then cancelled the certificate as far as he was concerned?

A. Yes, sir.

Q. Prior to the time when you formed this new partnership between yourself, your husband and the two children, had Joan and Billy helped in the lumber business?

A. Yes, sir. They came in occasionally because I wanted to teach them like I had been taught. I had been taught by my father and mother for a great many years before I was in the lumber business.

Q. They did some work in the business before they became partners?

A. Yes.

Q. Were they paid for that?

A. Yes, by us. [49]

Q. What duties was Joan to perform, Mrs. Medigovich, under the partnership arrangement?

A. Under the partnership arrangement, as she had been taught by me, she was to help me with the statements every month. I would get out the statements and she would put the tickets with the statements, put them in the envelopes and mail them. She also had to add columns of figures for me and check the columns which were gone over by Mr. Brooks. She also made the bank deposits for me, and

(Testimony of Mattie Edens Medigovich.)

note receipts whenever at any time a bill was paid, and when she was in the office she was to write receipts, and also she was to take over any time Mike and I were out whenever anyone called for merchandise, she had a set of keys and she opened up for customers.

Q. You follow the practice there that during off-business hours if a customer comes in from the country and needs something you supply them?

A. We are in a small town and our contractors many times get in after hours.

Q. Other than the time that Joan was attending school, how much of the time did she attend to the business?

A. Part of every day.

Q. Did she wait on trade also?

A. Yes, sir.

Q. When you and your husband were away she was in charge of the business? [50]

A. Yes, sir.

Q. Do you recall whether or not she signed checks?

A. I believe that she never had an occasion. She has written the checks and put them through the machine and all that, but I was usually there at the 10th of the month when we paid our bills. We don't pay bills any other time.

Q. Once a month? A. Once a month.

Q. She did make bank deposits?

A. Yes, sir.

Q. Did you and your husband and the children,

(Testimony of Mattie Edens Medigovich.)

particularly Joan, talk over the partnership business and how it would be conducted?

A. Yes, sir, because it was their money going into the partnership.

Q. You felt after they put up \$20,000 they were entitled to participate in the running of the business?

A. Yes, sir.

Q. At the time when Joan went to Stanford, Mrs. Medigovich, do you recall prior to that that you attended a Lumbermen's Convention?

A. Yes, sir.

Q. Where was that?

A. In Tucson.

Q. Do you recall whether or not she carried or wore a [51] button placard?

A. Yes. Joan Medigovich, Cottonwood Lumber Company.

Q. That was identifying?

A. Yes.

Q. Whatever they called them, of the various representatives were you advising the others what they were?

A. Yes, sir. For instance, if you take somebody else in, it is put on a guest.

Q. All have to wear what they call a nameplate so you are here as a member of the Association or a guest?

A. That is right.

Q. And she did wear the Cottonwood Lumber Company partners' insignia?

A. Yes, sir.

Q. Did you at that time discuss the question of her going to Stanford?

A. Yes, sir.

Q. Do you recall the occasion for its being discussed?

A. Of course we know all the lumbermen very

(Testimony of Mattie Edens Medigovich.)

well. We have to because I was brought up in the lumberman business and I went to conventions from the time I was eleven or twelve years old with my father. Everybody would ask her where she was going to school, and of course they knew she was graduating from high school that year.

Q. Do you recall whether or not that was discussed with [52] Mr. Michaels?

A. Yes, when he was present and many others present also. Of course, he was very busy with the convention. I knew that.

Q. It was a matter of common knowledge because Joan was pretty well liked; they all knew she planned to go to Stanford? A. Yes, sir.

Q. Did you ever have any information from Mr. Michaels or any one else that that wouldn't be appropriate or that wouldn't be proper?

A. No, sir,

Q. Have any influence on the insurance?

A. No, sir.

Q. And continue during this entire period. Did you pay the premiums? A. Yes, sir.

Q. When did Joan leave for Stanford?

A. About the 27th of September.

Q. When did she return?

A. November 14th or 15th.

Q. She was gone something over six weeks?

A. Maybe the 16th. Something over or about six weeks.

Q. During that period of time did you have occasion to correspond with her?

A. Every day. [53]

(Testimony of Mattie Edens Medigovich.)

Q. Did she answer your letters with respect to business matters particularly? A. Yes, sir.

Q. Did you have occasion during that period of time or did the partnership to acquire some additional partnership property? A. Yes, sir.

Q. What was that?

A. Sedona Lumber Company.

Q. Was that question of buying that additional business discussed with Joan by letters?

A. Yes, it certainly was; on the telephone and letters.

Q. You called her up and talked to her about it?

A. Yes, sir.

Q. Did you consistently during the entire time she was there keep her informed as to the partnership business affairs? A. Yes, sir.

Q. During that period of time did she continue to draw or was she entitled to go ahead drawing a portion of the partnership profit?

A. Yes, sir.

Q. I believe she did then return in the middle of November? A. Yes.

Q. And stayed in Cottonwood about until January? A. About the 19th of January. [54]

Or about the 20th of January, excuse me.

Q. Pardon me?

A. After the 20th of January.

Q. What did she do in the business during that period of time?

A. She wrote receipts. Went back to her old job, helped with the statements. We had lots to do around

(Testimony of Mattie Edens Medigovich.)

Christmas. Had to get all our customer gifts and customer cards, and she made bank deposits.

Q. I take it during that period of time she was practically full time in the business?

A. Yes, sir.

Q. Then when she went to Tempe, Mrs. Medigovich, I believe you felt that because of the closeness of Tempe to Cottonwood, she would practically spend most every week end at home?

A. We intended for her to spend every week end at home.

Q. In that period of time did she resume her old job in the business? A. Yes, sir.

Q. Over the week ends? A. Yes, sir.

Q. Did Joan ever make any recommendation to you, for instance, with respect to remodeling or matters she picked up?

A. Yes, sir. Joan talked to us about that. She thought the inside of the lumber yard was getting a little bit old. [55] After all, it had stayed the same since grandfather was there and she thought it would be nice if we called in Mr. Stanley and had the lumber yard remodeled and do a little cleaning up and painting.

Q. That was discussed as a partnership project?

A. Yes, sir.

Q. Did you pursuant to that do it?

A. She started it herself. During the time we went to the Coast she got busy and cleaned up; put any catalogues we no longer needed out of the way,

(Testimony of Mattie Edens Medigovich.)

threw away catalogues we didn't need; threw away invoices we no longer needed, and cleaned out the desk drawers, all the bookkeeping supplies.

Q. Then I take it that she had a mind of her own and pretty active? A. Very much so.

Q. And participated in the partnership as such. Do you recall whether or not in consultations you had with customers about proposed building programs or supplies needed if Joan participated?

A. Joan was very interested like I myself in house plans. Of course that was all she ever heard, was building, and she was always very interested. When somebody would bring in a plan she liked to look it over and see how it looked and how she felt the arrangement went and things of that nature. Color scheming she liked very much. [56]

Cross-Examination

By Mr. Lester:

Q. What was the object of forming this partnership, this family partnership?

A. Because the children put their own money into the business and we felt they should have their legal right to part of the business.

Q. Was there a particular tax advantage to be gained by it? A. I know nothing about that.

Q. That was all handled by Mr. Brooks?

A. Yes, sir.

Q. He handles all your tax work?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir.

Q. It was his suggestion that you form a family partnership?

A. I told Mr. Brooks, "Mr. Brooks, I only have the two children." (Witness cries.) "And I am unprotected in every way as to their legal rights to their money and they should be protected, and which way can we set this up to where they have their share and their responsibility."

Q. Do you mean to say, Mrs. Medigovich, that Billy and Joan consulted about the business matters with you and your husband?

A. Yes. We never hid anything from them because at the time I felt very much like they should know all the ropes because at some time they would be all of the business completely.

Q. In other words, you were more or less bringing them up [57] to the business? A. Yes, sir.

Q. In the business. You were educating them?

A. Yes, sir.

Q. Rather than consulting with them as to what should be done about business affairs?

A. We talked it over with them about what things should be done, because after all they had their investments.

Q. Have you told them what the problems were?

A. You didn't exactly tell them. They, of course, had minds of their own.

Q. Billy was only thirteen years.

(Testimony of Mattie Edens Medigovich.)

A. Billy was very worried when he put his money into the business. He wanted to know how his bonds accumulated interest. He wanted to be sure if he put it in the Cottonwood Lumber Company that it wouldn't sink.

Q. You don't want the Court to believe that Billy and Joan advised you and Mike how to run the business?

A. You should stay around Billy and Joan. You should have been around them. They certainly had minds of their own.

Q. Do you also suggest that when Joan was at Stanford that you consulted her as to what she thought was best in business matters while she was away?

A. Naturally my husband and I were the managers. I admit that, but we discussed all business problems with them, and we [58] were in constant contact with Joan either by mail or by phone.

Q. Was that for consultation purposes?

A. Well, we missed her very much and it was to tell her everything that was going on, naturally.

Q. You would have done that anyway whether she had any interest in the business. Wouldn't you have called her when she was away at school, the first time she went way to school?

A. Yes, sir, I certainly would have.

Q. What were her school hours before she graduated in Cottonwood from high school?

A. From 8:15 to 3:30.

Q. She attended school regularly, did she?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir.

Q. Did she ever do any home work?

A. Very little. She did some at nights.

Q. So she couldn't have done any work during the school hours and during the time she was doing home work, could she?

A. She stayed up very late at night to do home work, what she did other than the study hours at school, which she had.

Q. Can you tell us how many different jobs Joan had in 1952, the entire year?

A. The only job that she ever had, and I can't recall if that was '52, I believe it was for a little while. It was just because she knew how to run a business, in other words, adding machine, I mean the register. Those accounts she did because [59] we were very good friends and she knew how to do it, and it was her hobby, photography was her hobby at times, and so she went in the photo lab in Cottonwood so that Mr. and Mrs. Barrows could be away.

Q. That was a photo shop? A. Yes.

Q. That you say is the only job that she ever held in 1952 besides——

A. That I recall, I don't know, other than the Cottonwood Lumber Company.

Q. Did she ever work in the theatre?

A. No, I don't recall it.

Q. Did she at any time to your knowledge work in the theatre? A. Not that I remember, no.

Q. How about the bakery? A. No.

Q. Any other of those business establishments

(Testimony of Mattie Edens Medigovich.)

right near your place of business? A. No.

Q. How about Robinson's Department Store; did she work there?

A. She helped Robinson's several years back during a Christmas vacation rush.

Q. How many years ago would that be?

A. I don't recall. It would be two or three years previous. [60] I don't remember; it was only for some short time.

Q. 1949 or 1950? A. Somewhere in there.

Q. But it could not have been in 1952, you say that? A. Oh, no.

Q. Could it have been in 1951?

A. It could have probably been in 1951. It was only a very short time and it was only because of us being friends again that she helped them during their Christmas hours.

Q. How long did she work in the photo lab?

A. As I recall, Mr. Barrows could probably tell you because I don't recall just exactly how long. It wasn't very long.

Q. Can you give us some idea, a month, week, day?

A. It seemed to me like they were gone a week.

Q. When was that? A. I don't recall.

Q. What year, 1952?

A. It may have been in '51. I don't recall it was in 1952.

Q. Are you saying that as far as you know Joan worked approximately only one week in the photo shop?

(Testimony of Mattie Edens Medigovich.)

A. You mean in the whole back in 1951?

Q. During all of 1952.

A. I don't recall how long. I don't remember if it was '52. I couldn't recall if it was 1951 or 1952.

Q. Are you saying she worked there for only approximately [61] only one week during that entire year?

A. I could ask Mr. Barrows. I don't remember just exactly how long it was. It wasn't very long I know. It was just out of a friendly deal more or less because she knew how to do it.

Q. You don't know if she worked there customarily every day?

A. Oh, no, she didn't work there customarily every day.

Q. The photo shop is right next door to your place of business, two doors down?

A. Two doors, yes.

Q. Did she receive any pay from the work that she did at the photo shop?

A. I think it was more or less—I don't know what the deal was. I think that she bought a lot of film and took a lot of pictures. I think it all went in on that.

Q. As a matter of fact, Mrs. Medigovich, isn't it true that she spent a considerable amount of time in the photo shop in 1952, almost daily working and getting paid?

A. No, sir, not that I recall, no.

(Testimony of Mattie Edens Medigovich.)

Q. Is it your position she only worked about a week during 1952?

A. I couldn't say just exactly how many days it was but it wasn't very long because I had to have her at the lumber yard. It was only possibly a little while during the day.

Q. Before she graduated from high school, when did she have a chance or occasion to do any work at the lumber yard? [62]

A. After school.

Q. She gets home around 3:30?

A. Yes, sir.

Q. You close about what time?

A. About six.

Q. You are saying she would come to the lumber yard and work from 3:30 to six?

A. Well, I wouldn't say those definite hours every day. She could come in and help. She had her set duties to help me and then she spent many times in the evenings at home she would do a lot of bookkeeping.

Q. You and Mike were usually at the office, weren't you?

A. No, sir, I wasn't.

Q. Where were you, in the back?

A. Well, I was—sick leave sometimes as much as two months at a time.

Q. By the way, where were you?

A. In the hospital. I was in the hospital in Phoenix and Cottonwood.

Q. Which was that?

A. The Memorial in Cottonwood and the Good Samaritan in Phoenix.

(Testimony of Mattie Edens Medigovich.)

Q. She would come home from school and when she would come home she would do various odd duties?

A. It wasn't exactly odd jobs. She had quite a heavy load [63] in 1952.

Q. How many employees do you employ?

A. It depends. Sometimes we have extra. We have steady around six.

Q. Their hours are when to when?

A. Some of their hours are very irregular. For instance, they pay on an hourly basis.

Q. When did they report? When do these employees report for duty?

A. They are supposed to report, depending on when we need them. Sometimes they report at six o'clock in the morning to take a truck out.

Q. Is that every day? A. Not every day.

Q. Do they report for work every day?

A. Unless they are ill.

Q. Realizing there may be some times when they are ill, but excepting those instances, they do come to work every day? A. Yes, sir.

Q. Approximately what time every day?

A. The time that we come is eight o'clock. They usually come at eight o'clock.

Q. When do they quit?

A. It was supposed to be 5:30 but they never get off. It is usually six or later. [64]

Q. They generally work later? A. Yes.

Q. Those four or five or six employees you customarily employ work on a full-time daily basis?

(Testimony of Mattie Edens Medigovich.)

A. Yes, sir, an hourly pay basis.

Q. So the most Joan could have worked was an hour and a half after school?

A. Sometimes.

Q. Or two hours?

A. Sometimes it amounted to much more. Around the first of the month she had her duties helping with the statements which amounted to quite a number of more hours.

Q. When did she do this work?

A. You would be surprised. We worked many nights until one or two o'clock in the morning.

Q. Did she help you like that in previous years?

A. No.

Q. Never did?

A. No.

Q. Did she ever work there at all in previous years?

A. I was teaching her in previous years. I started when she was twelve.

Q. Between the time when she was twelve and 1952 what kind of duties did she have?

A. She didn't have exactly duties in those days because [65] it was only duties to me then.

Q. She was helping you, wasn't she?

A. Along with my teaching her.

Q. What was she doing?

A. She wasn't as capable at first.

Q. What was she doing?

A. I taught her to add columns, taught her to figure footage; taught her to write receipts; and she took telephone calls.

(Testimony of Mattie Edens Medigovich.)

Q. Between the time when she was twelve and 1952?

A. Yes, sir. But her duties were much more in '52.

Q. Naturally as she got older she learned a little more, isn't that right?

A. I wouldn't say that; she was very capable.

Q. So that there was no substantial change when she became a partner?

A. Yes, there was; there certainly was. As far as Joan was concerned, when she became a partner her money was invested in the business and she was part of the business.

Q. She received an income? A. Yes, sir.

Q. How much?

A. Well, she received, she was drawing \$200.00 a month, but at the end of the fiscal year it was all figured up. In other words, the profits were divided accordingly and she had her share of the profits in the business. [66]

Q. Her profits were predicated on the amount of her investment? A. Yes, sir.

Q. You say she left Stanford—left September 27th and returned November 16, 1952?

A. Somewhere in that area. I don't remember exact dates.

Q. When she returned in November of 1952 what did she do? A. She was in the hospital.

Q. For you remember how long?

A. Close to a week.

Q. In Cottonwood? A. In Cottonwood.

(Testimony of Mattie Edens Medigovich.)

Q. After she left the hospital did she convalesce or anything?

A. No, sir, she started helping me in the business.

Q. Did she work anywhere else after getting out of the hospital?

A. No, sir.

Q. So she remained in Cottonwood until January 20th?

A. The 20th.

Q. Of '53?

A. Yes.

Redirect Examination

By Mr. Wilmer:

Q. You told of talking with Joan by telephone and discussing these matters. Counsel asked if you wouldn't have called her [67] anyway even if she hadn't had a financial stake in the business. If she hadn't had the financial stake in the business as a partner would you have discussed the business affairs of the partnership with her?

A. No, sir.

Mr. Wilmer: That is all.

The Court: Perhaps we should take our noon recess at this time until 1:30.

(Whereupon the Court recessed until 1:30 o'clock p.m.)

July 29, 1954—1:30 o'Clock P.M.

MICHAEL MEDIGOVICH

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Mr. Medigovich, you are the husband of the lady who just testified? A. Yes, sir.

Q. You have lived in Cottonwood for many years? A. Yes, sir.

Q. In order not to take a lot of unnecessary time, Mike, I am just going to ask some brief questions. You were here and heard your wife testify as to the organization of this partnership and the source of the funds that went into it? [68]

A. Yes, sir.

Q. Is that your testimony? A. Yes, sir.

Q. Prior to the time when the partnership was formed, Mike, did Joan and Billy also spend some time in the business; did they work around the place as kids? A. They were around.

Q. After the partnership was formed did they take a greater interest in or devote more time to the partnership? A. Yes, sir.

Q. When did Joan graduate from the high school in Cottonwood? A. May, 1952.

Q. That was in May, 1952? A. Yes, sir.

Q. Then she was home from May of 1952, until I believe the latter part of September of 1952?

A. Yes, sir.

(Testimony of Michael Medigovich.)

Q. During that period, Mr. Medigovich, how much time did she spend in the business there at Cottonwood? A. She was there every day.

Q. Did she devote a substantial part of her time after that to the business? A. Yes, sir.

Q. This continued through this entire period from her graduation in May until she left for Stanford in September? A. Yes, sir. [69]

Q. You have heard your wife's statement as to the work she did in the partnership, that is, the matter of taking receipts, sending out bills, banking, bookkeeping, and so on. Is that your recollection? A. Yes, sir.

Q. Your wife said something, Mike, with respect to the fact that many times they worked at night. Do you have recollection of that? A. Yes, sir.

Q. How often and how late at night did they work?

A. How often I couldn't say but it would be sometimes as much as two or three times in a month.

Q. In other words as distinguished from employees, the partners' hours were such as required to take care of the business? A. That is right.

Q. With respect to the matter of contractors and others coming in at other than regular business hours, who besides yourself and your wife had keys to the lumber yard?

A. Joan had keys. She could open up for anybody she knew.

Q. Did she do that, to your knowledge, quite frequently? A. Quite often.

(Testimony of Michael Medigovich.)

Q. I take it that by reason of your location and the fact that people aren't able to get in during regular hours, you have quite a volume of off-hour work or sales, I should say? [70] A. Yes, sir.

Q. From the time when Joan came home from Stanford and after she returned from the hospital and until she left, I believe the 20th of January, did she devote substantially all of her time to the partnership? A. Practically.

Q. Doing what was necessary and what she did she did for the partnership? A. That is right.

Cross-Examination

By Mr. Lester:

Q. Joan wasn't in any sense of the word a full-time employee, was she, Mr. Medigovich?

Mr. Wilmer: We object to that on the ground that a full-time employee as contemplated by the contract is different from a partner or a partner who is a full partner.

The Court: I think he should tell what she did. That may be a question for me.

Q. Let me rephrase and ask the question this way, Mr. Medigovich. She obviously wasn't working full time or on a full-time basis during any time in 1952?

Mr. Wilmer: I object to that on the ground that a partner as such occupies a completely different relationship than an employee, and you can't say a partner is working full time or part time. That

(Testimony of Michael Medigovich.)

isn't the language that is applied to a partnership organization and business. I have no objection to his examining fully and in detail as to everything she did [71] and leave it up to the Court.

The Court: I think that is what we should do. That is the thing that will mean something to me. What she actually did.

Mr. Lester: Mr. Wilmer's objection is based upon his personal construction of the policy and my question is based upon the construction I think is correct and I don't see that the question is objectionable. She either worked full time or she did not.

The Court: My point is this: If she says she was or wasn't, that doesn't mean anything to me. If you have him tell how much of the day or on the average how much of the day she put in and what she did, then I will have some conception of it, but when you ask him if it was full time and if he says yes or no, I don't know if he means twenty-four hours, if he means a good part of the day or what. I think we ought to stick with the facts, what she actually did. That will be the most informative to me.

Q. (By Mr. Lester): You had, I understand, five or six employees at your place of business customarily, is that correct? A. That is right.

Q. They would put in a full day, is that right, every day? A. Yes, sir.

Q. That would be usually more than an eight-hour day? A. I beg your pardon? [72]

Q. Usually would that entail more than eight hours for each man? A. Yes.

(Testimony of Michael Medigovich.)

Q. How many hours would you say that Joan averaged? A. She usually averaged——

Mr. Wilmer: If the Court please, I am a full-time partner and I am working as a partner all of the time, even though I may be 100 miles from the office. It is the same way with this man. We have no objection as to when she got there, but it is for the Court to say if she was working full time as a partner.

The Court: I take it the question is how many hours a day she put in.

Mr. Wilmer: We have no objection.

A. She averaged at least five or six hours every day.

Q. Every day of 1952?

A. No. You asked me from the time she came home from school.

Q. You mean after 3:30 in the afternoon?

A. The way I understood your question was how many hours she put in after she got back home from Stanford?

Q. No. During 1952, Mr. Medigovich, on the average how much time did she put in doing work for the business per day?

A. That would be pretty hard to say how much, at least a couple of hours she got in every day. [73]

Q. On the days she did no work? A. Yes.

Q. There were a number of times, weren't there, Mr. Medigovich, when she had social activities she was interested in and would participate in with her friends?

(Testimony of Michael Medigovich.)

A. I can't recall too closely about it but I suppose there were.

Q. For example, she probably went swimming in the summertime a little bit, didn't she? Wouldn't she go swimming on occasions?

A. Yes.

Q. Horseback riding?

A. Some.

Q. Parties?

A. Sure.

Mr. Lester: That is all.

Redirect Examination

By Mr. Wilmer:

Q. Mr. Medigovich, I presume you went to parties sometimes?

A. I sure do.

Q. You are away from the business for recreational purposes at times?

A. Yes.

Q. The amount of time which Joan devoted to the business which was such as required to discharge her assigned duties?

A. That is right. [74]

Q. Did you attempt to keep any track of the times in the evenings and Sundays and Saturday afternoons, if you were closed when she would go open the business and sell merchandise?

A. They were too numerous to mention.

Q. You made no effort to keep track of the hours you or your wife or son and daughter put in the business?

A. No.

Q. While she was there she was on call at all times if she was required in the business?

(Testimony of Michael Medigovich.)

A. That is right.

Q. When you were gone she runs the office in complete charge?

A. Yes.

Recross-Examination

By Mr. Lester:

Q. You were devoting your full time to the business, were you not?

A. Yes, I had no other business.

Q. You weren't employed, or did you run any other business? You didn't work at the photo lab part time?

A. I wouldn't say I did.

The Court: You answered a question about the average length of time that Joan put in in this clerical work in the business. As I get the picture there are different stages in the year 1952. Confining yourself now to the time in 1952 when she was still in high school—— [75]

A. Yes.

The Court: How much time on the average per day did she give to this work in the lumber yard?

A. She gave about, somewhere in the neighborhood of two hours.

The Court: Then, when she got out of high school and in the summertime, between the time when she got out of high school and when she went to Stanford, how much time did she put in in the work in the lumber yard?

A. The biggest part of the day, which would run five or six hours some days, depending on how much work there was.

(Testimony of Michael Medigovich.)

The Court: I believe you testified that between the time she returned from Stanford and went to Tempe, and after she got out of the hospital, how much time was it you said she spent in that period?

A. Around five or six hours every day.

K. NORTON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Mr. Norton, would you state your name for the record? A. K. Norton.

Q. You are an attorney at law?

A. Yes. [76]

Q. Practicing at—— A. Cottonwood.

Q. How long have you been there, Mr. Norton?

A. Upwards of twenty years.

Q. I take it you are well acquainted with folks up there? A. I think I know most everyone.

Q. You know Mr. and Mrs. Medigovich?

A. Oh, yes.

Q. Did you do the legal work for the Cottonwood Lumber Company, Mr. Norton?

A. A lot of it, yes.

Q. You are familiar then with the time when J. F. Edens sold his interest in the partnership and retired from it? A. Yes.

Q. I presume you are familiar with the circumstances of Joan and Billy Medigovich coming into

(Testimony of K. Norton.)

the partnership? A. I am.

Q. Were you consulted with respect to that, Mr. Norton? A. Yes, sir.

Q. Did you advise them with respect to the formation of the partnership and what it entailed and so on? A. Yes.

Q. Did you have any discussions with Mr. and Mrs. Medigovich and the two younger Medigoviches as to how a partnership worked and the responsibilities, and so on? [77] A. Yes.

Q. Were you commissioned to draw a partnership agreement?

A. I suppose that is what you would call it.

Q. I believe you have made a search the last few days, Mr. Norton, to see if you could find the final form that that partnership was reduced to?

A. I have.

Q. But you have been unable to locate it?

A. That is right.

Q. Do you recall that there was such a partnership agreement prepared? That it was in form for execution?

A. As far as the partnership contract is concerned, we started at one time to draw such an instrument and then we had the question of how we were to figure in the partnership agreement, just exactly what interest the two children had.

Q. What their percentage of the profits would be? be?

A. Yes; and we held that while the auditor tried

(Testimony of K. Norton.)

to figure out some way to get it set up so he could tell me just exactly what the figure was.

Q. So that the auditor never having come forward with that figure, you never did complete the form of partnerships?

A. There was a rough draft form of the partnership agreement, I recall distinctly, however, I don't remember ever signing one.

Q. But there definitely was a partnership set up? [78]

A. There was a partnership agreement between the parties.

Q. Do you recall in that connection what the agreement was as to what Joan Medigovich and Billy Medigovich were to do in the partnership?

A. There was quite a discussion about that. It was finally understood in the discussion that they would work when they weren't going to school or had some activity that would keep them from it. They were to take a part in the partnership and work at it.

Q. In other words, they gave regular recognition to the fact that one was twelve or thirteen and the other sixteen or seventeen?

A. Those things were considered, yes.

Q. I presume, Mr. Norton, you yourself had occasion to be around the Cottonwood Lumber Company?

A. Nearly every day.

Q. Did you notice Joan there subsequent to this partnership agreement?

A. Many, many times.

(Testimony of K. Norton.)

Q. Did you observe what she was doing?

A. She was usually working at the desk. I have seen her taking money. I have seen her wait on trade; in fact, I bought some things when she waited on me at the Cottonwood Lumber Company. I have seen her working at the desk, running an adding machine, calculator, whatever they have there. [79] She was just working in the office like anyone else would work.

Q. Your observation then would be to the effect that she was working pretty steadily at her job when she wasn't in school?

A. Yes, that is right.

Cross-Examination

By Mr. Lester:

Q. Do you know if she worked anywhere else, Mr. Norton?

A. I saw her one day I think at one time while in the photo lab. She was in there and she was the only one there.

Q. Was she working there then?

A. I suppose she was.

Mr. Lester: That is all.

Redirect Examination

By Mr. Wilmer:

Q. That is one day? A. Yes.

Recross-Examination

By Mr. Lester:

Q. Were you in there on other occasions?

A. I don't recall being in there but I go by nearly every day.

(Testimony of K. Norton.)

Q. You had a number of occasions to go to the Cottonwood Lumber Company?

A. I have been in there quite a number of times, yes.

Q. She wasn't in there every day that you were there?

A. No, she wasn't there each time I have been there. [80]

TONY STADELMAN

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Will you state your name, please?

A. Tony Stadelman.

Q. Where do you live? A. Cottonwood.

Q. What is your business?

A. Building contractor.

Q. How long have you lived there?

A. About 32 years in Cottonwood.

Q. How long have you been in the contracting business? A. About 10 years.

Q. That is the past ten years? A. Yes, sir.

Q. That would carry you in the business through 1952, that is, you were in that business in 1952?

A. Yes, sir.

Q. Are you acquainted with Mr. and Mrs. Medigovich? A. Yes, sir.

Q. Do you have occasions in your business of

(Testimony of Tony Stadelman.)

contracting to trade at the Cottonwood Lumber Company? A. Yes, sir, the biggest part.

Q. You were acquainted with Joan Medigovich? [81] A. Yes, sir.

Q. Tell me, do you have occasion to go to the lumber yard at other than regular business hours?

A. Yes, sir, I do.

Q. Why is that?

A. The biggest part of my work is out in the country and I don't get into town until after they are closed, so I go up to the house and if Mike and Mattie aren't up there, Joan or Billy would take care of me.

Q. They would open the yard and supply you with what you needed?

A. Open the yard and take care of me.

Q. During the year 1952 did you have occasion to be at the Cottonwood Lumber Company with some regularity? A. Almost every day.

Q. For business purposes I take it?

A. Yes, sir.

Q. You observed, Mr. Stadelman, whether or not Joan was usually there when you were there?

A. She was there most of the time when I was there because I always came in in the evenings.

Q. What would she be doing?

A. Working at the desk, helping her mother, or wait on me at times.

Q. Do you know the time when she obtained a partnership [82] interest in the business?

(Testimony of Tony Stadelman.)

A. Yes, sir.

Q. Was that pretty generally known at Cottonwood?
A. I believe it was.

Q. It was pretty generally known the time when the children became partners?
A. Yes, sir.

Q. I take it in a community such as Cottonwood you are all very friendly and much more concerned with one another's personal doings than in a larger place?
A. Yes, sir.

Mr. Lester: No cross-examination.

NORMAN FAIN

called as a witness herein, having been first duly sworn, testified on his oath as follows:

Direct Examination

By Mr. Wilmer:

Q. State your name, please.

A. Norman Fain.

Q. I believe you have a ranch at Dewey?

A. Yes, I do.

Q. That is not very far from Cottonwood, is it?

A. About 35 miles.

Q. You have occasion to trade some in Cottonwood?

A. We carry an account there all of the time. [83]

Q. That is at the Cottonwood Lumber Company?

A. At the Cottonwood Lumber Company.

Q. Was that true in 1952?
A. Yes.

Q. I take it then you are acquainted with Mr. and Mrs. Medigovich and Joan and Billy?

(Testimony of Norman Fain.)

A. Quite well.

Q. How long have you known them?

A. I knew the Medigoviches since the early 30's; I guess Joan and Billy since they were just babies.

Q. You then knew of the time when Edens retired from the business, that is the father?

A. Yes.

Q. And of the partnership that existed between Mike and his wife and her brother J. F.?

A. Yes.

Q. Then did you learn of a change because J. F. Edens had withdrawn and Joan and Billy had become partners?

A. Yes, we discussed that to some extent at the time.

Q. That was something you were interested in because you had known the family quite awhile?

A. Yes.

Q. And you were interested in the children's going into the business? A. Yes. [84]

Q. How often would you say, Norman, you had occasion to be at the Cottonwood Lumber Company on the average through 1952?

A. I would say from month to month, twice a week.

Q. Did you have occasion when you were there to observe what Joan was doing in the business as a part of the business?

A. On a good many occasions, yes.

Q. What did you observe?

A. I observed her working at the desk. I had

(Testimony of Norman Fain.)

lunch with her parents at different times and she would keep the office open while we were at lunch. I remember one or two occasions when after hours she sold me small purchases or things that had been forgotten, or that I needed due to the fact that I lived so far away. They were nice about opening up after hours for anything we might need; any of their family.

Q. The observations you made then was that Joan was pretty active in the business?

A. Yes, during the time she wasn't in school.

Cross-Examination

By Mr. Lester:

Q. Did she appear to have regular hours?

A. I wouldn't know about that because I was just there on occasions.

Mr. Lester: No further questions.

Mr. Wilmer: That is all. [85]

ERSEL GARRISON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. State your name, please.

A. Ersel Garrison.

Q. Mr. Garrison, do you reside in Cottonwood?

A. Yes, sir.

Q. How long have you lived there?

(Testimony of Ersel Garrison.)

A. Since 1919.

Q. What is your business?

A. Automobile business.

Q. You have been in Cottonwood since 1919?

A. Yes, sir.

Q. I take it then you were well acquainted with Mr. Edens when he ran the Cottonwood Lumber Company and his daughter, Mrs. Medigovich?

A. Yes, sir.

Q. And have been quite familiar with the family and the business activities in the Cottonwood Lumber Company?

A. Yes, sir.

Q. For the record, Mr. Garrison, what is the approximate population of Cottonwood?

A. Approximately 2,000.

Q. It is located where with respect to Clemenceau? [86]

A. Clemenceau is to the south of Cottonwood about a mile and three-fourths.

Q. Cottonwood is how far from the highway crossing the Verde River? How far on to the northeast?

A. Three miles.

Q. It is on the highway that runs from Jerome through Rock Creek Canyon to Flagstaff?

A. On Highway 89A.

Q. The Jerome-Flagstaff-Sedona highway and so forth. Did you learn of the retirement of Mr. Edens, Mrs. Medigovich's father, from the business?

A. Yes, sir.

Q. You knew when that took place. Did you also know of the partnership that existed between Mr.

(Testimony of Ersel Garrison.)

and Mrs. Medigovich and her brother, J. F. Edens, for a time? A. Yes, sir.

Q. Did you know of the termination of that and the formation of the new one? A. Yes, sir.

Q. How did you learn of the formation of the new partnership between Mr. and Mrs. Medigovich and Joan and Billy, if you recall?

A. I don't recall just how, but it was, I think it was, I recall Mr. Medigovich told me there was a change.

Q. It was a well-known fact in the community that the [87] children had come into the business?

A. Yes, sir.

Q. Did you have occasion during 1952 to be at the Cottonwood Lumber Company from time to time?

A. We do business with the Cottonwood Lumber Company most every day in the conduct of our business in buying supplies and materials, likewise we sell the Cottonwood Lumber Company trucks and perform services; so there is almost a continuous business connection there almost daily.

Q. You service their automotive equipment?

A. Yes, sir.

Q. After the partnership was formed in February or March, 1952, did you notice how much time Joan spent in the business there?

A. No, I didn't, only that she was often there when I called for something.

(Testimony of Ersel Garrison.)

Q. Did you know, or did you notice what she was doing?

A. Just the ordinary work in the office.

Q. Did she on occasion wait on the trade?

A. Yes, sir.

Q. Did you ever have occasion to go there after hours?

A. We don't operate our business; it isn't necessary.

Q. You close up and you would have no occasion because you are in town? A. Yes, sir. [88]

Q. Could you tell me, Mr. Garrison, how often that you would notice Joan there through the summer of 1952 when she was through with high school? Was she there substantially all the time as far as you recall? A. Yes, sir.

Q. Was she a pretty enterprising, energetic sort of girl? A. Very much.

Q. She was right busy in there when you were there? A. All the time.

Cross-Examination

By Mr. Lester:

Q. Did you notice her there at any other time besides the summer of 1952?

A. Yes. The girl had grown up there.

Q. I mean in the business. Did you notice her in the office? A. Yes.

Q. When? A. Well, all—for a long time.

Q. What time of the day?

A. Well, that would vary; maybe on Saturdays.

(Testimony of Ersel Garrison.)

Q. How about during the week?

A. Well, that would all depend on what time of day I would go in.

Q. What time of day would you see her usually except in the summer?

A. Well, it would be in the daytime. [89]

Q. In the morning?

A. I don't recall of paying any attention of what time of day it was.

Q. Do you realize that she was in school?

A. Yes.

Mr. Lester: That is all.

Mr. Wilmer: That is all.

JOHN M. FAIRFIELD

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. What is your name?

A. John M. Fairfield.

Q. Mr. Fairfield, you reside in Cottonwood?

A. I reside in Glendale. I have a place of business in Cottonwood.

Q. You drive back and forth every day?

A. That is right.

Q. What is your employment?

A. Manager of the Cottonwood branch of the Bank of Arizona.

Q. How long have you been in that business?

(Testimony of John M. Fairfield.)

A. I have been manager of the Glendale office since 1951, and we moved our office to Cottonwood on January 25th of this [90] year.

Q. Did you have a branch in Cottonwood prior to this time? A. We had a facility.

Q. That is a place where people could make deposits and cash checks? A. That is right.

Q. Was the Cottonwood Lumber Company a customer of your bank? A. Yes.

Q. Did you know Joan Medigovich?

A. Yes.

Q. Did you have occasion to have financial statements rendered or given to you by the Cottonwood Lumber Company? A. We did.

Q. Do you recall such a financial statement being delivered or given to the bank in 1952?

A. I have one dated August 31, 1952.

Q. Do you recall what that showed with respect to who the owners of the Cottonwood Lumber Company were? A. Yes.

Q. What does that show?

A. It shows Mr. and Mrs. Medigovich and Billy and Joan as partners under the capitalization.

Q. In the ownership? A. Yes. [91]

Q. Do you recall, Mr. Fairfield, whether or not—were your duties such—that you would know whether or not Joan made deposits in the bank from time to time?

A. I have seen her make them. I have taken them from her.

Q. That is for the partnership? A. Yes.

(Testimony of John M. Fairfield.)

Q. Did you have occasion to be at the Cottonwood Lumber Company many times?

A. On rare occasions.

Cross-Examination

By Mr. Lester:

Q. You wouldn't know what her activities were then?

A. No, I would not.

Mr. Lester: That is all.

ERNIE BROUGHTON

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

The Court: All witnesses may be excused after they have testified unless counsel asks them to remain.

Q. (By Mr. Wilmer): Mr. Broughton, state your name for the record.

A. Ernie Broughton.

Q. Mr. Broughton, where do you live?

A. Cottonwood, Arizona. [92]

Q. How long have you lived there?

A. About twenty-five years.

Q. What is your business?

A. Building contractor.

Q. Were you in that business in 1952?

A. Yes, sir.

Q. Did you have occasion to do business with the

(Testimony of Ernie Broughton.)

Cottonwood Lumber Company? A. Yes, sir.

Q. For how long?

A. I have done business with them since about 1934.

Q. I presume then you have been quite familiar with the ownership and the operation of that business? A. Yes, sir.

Q. You trade with them a lot? A. Yes.

Q. Did you know, Mr. Broughton, of the fact that Joan and Billy had bought into the partnership in the spring of 1952? A. Yes, sir.

Q. How did you learn of that, if you recall?

A. Pardon?

Q. Do you recall how you learned of that?

A. I believe I made the inquiry when Mattie's brother left.

Mr. Lester: We do not contest the fact that she was a partner. We are only contesting that she wasn't an active [93] partner and also the fact that she was not an employee in the sense of that word used and defined. I don't see where it makes any difference if he knew about the partnership or not. We concede she was a partner.

Mr. Wilmer: Very well. With counsel's statement I will limit testimony.

Q. (By Mr. Wilmer): Did you have occasion to observe from time to time the work that Joan did around the lumber yard? A. Yes.

Q. How frequently did you observe it?

A. After nearly every evening. I never got to go

(Testimony of Ernie Broughton.)

in the lumber yard in the day, but in the evening if I got in after they closed she was often in the office and would assist in any of my requirements, and if I didn't get in I would sometimes call and she would answer and take my order by phone; and I have gone after they closed in the evening and nobody was home and have gotten the keys from her to get material and left them with her.

Q. Did you say you generally didn't get to the lumber yard until late in the afternoon or evening?

A. That is right.

Q. You wouldn't know in the summer of 1952 how much time she spent in the morning there?

A. No, I wouldn't.

Q. Your observation is practically limited to every time [94] in the evening when you would go there she would be at the place of business?

A. That is right.

Q. And that when it was closed she would have the keys and would open up for you? A. Yes.

Cross-Examination

By Mr. Lester:

Q. I believe you said she was often there; wasn't that the word you used rather than practically every time?

A. I didn't get in every night. Lots of nights I didn't go in so I wouldn't know if she was there or not, but when I did go in that summer she was practically there all the time.

JOE STARKEY

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. You are Joe Starkey? A. Yes, sir.

Q. Mr. Starkey, where do you live, sir?

A. Cottonwood.

Q. How long have you lived there?

A. I have lived there about since World War II and I was in there at the beginning of World War II. I established a residence there but went in the Service and came back after [95] the Service.

Q. What is your business?

A. Contracting, painting and decorating.

Q. As such, do you have occasion to do business with the Cottonwood Lumber Company?

A. Yes.

Q. Did you have occasion to do business with them in 1952? A. Oh, yes.

Q. Were you acquainted with Joan Medigovich?

A. Yes, I knew her.

Q. How often did you have occasion to go to the Cottonwood Lumber Company?

A. There are mighty few days I don't go in at all.

Q. Buying or other similar activities?

A. Yes.

Q. Through 1952, did you observe how much time, or did you observe her when you were in there, if Joan was or was not there?

(Testimony of Joe Starkey.)

A. Yes, she was there most all of my trips. She was there in the evenings. After we would get through with a job we would come in. She was usually always there.

Q. Making preparation for the next day's work?

A. Yes.

Q. What would she be doing, Mr. Starkey?

A. Well, now, she was usually in the office but she waited [96] on me sometimes as late as nine o'clock at nights. When I would come in from Flagstaff or Williams or some place out of town I would call her to come and open the business so we could get the materials out for the next day.

Q. Was she quite often the one that would take care of you when you came in after hours?

A. She usually waited on me after hours. When Mike was there he would take care of me, but they were usually gone in the evenings. In the evenings she usually always took care of the business.

Mr. Lester: No cross-examination.

IMOGENE PENDERGRASS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Wilmer:

Q. Will you state your name, please?

A. Imogene Pendergrass.

Q. Where do you live? A. Bridgeport.

Q. Where is that with respect to Cottonwood?

(Testimony of Imogene Pendergrass.)

A. About three miles south and east of Cottonwood.

Q. How long have you lived there?

A. Since '46.

Q. Are you acquainted with the Cottonwood Lumber Company [97] and the folks that run it?

A. Yes, I am.

Q. Did you ever work there? A. Some.

Q. Did you work there in 1952?

A. A little.

Q. What work did you do?

A. Just clerical.

Q. Did you know Joan Medigovich?

A. Yes, I did.

Q. Was she there when you were working there?

A. Yes.

Q. What duties did she perform while you were there?

A. Well, she waited on the customers and does the usual clerical work.

Q. Did she have any more authority than you did? A. Certainly.

Q. What was that?

A. I mean with money she can do things, or get money and do that. I don't assume anything like that.

Q. You knew she was one of the owners?

A. Certainly.

Q. Did she have authority to open and close the business? A. Yes, she did.

(Testimony of Imogene Pendergrass.)

Q. Would you be there sometimes when Mr. and Mrs. Medigovich [98] would be away?

A. Some.

Q. When they were away who ran the business?

A. Joan it could be if she was there, yes.

Cross-Examination

By Mr. Lester:

Q. When did you go to work at the Lumber Company?

A. I don't really remember. I just helped there off and on in a friendly sort of way; when Joan couldn't be there or was at school or something I might help out, or something.

Q. Were you there in the summertime of 1952?

A. Very little.

Q. You were there? A. Yes, some.

Q. How did you know when to go to work?

A. Mattie called me up or I stopped in, and if there was anything I could do I would do it.

Q. They would call you in advance of the following day? A. Generally the same day.

Q. Would you then go to work at various times?

A. Various, there were no set times.

Q. Sometimes in the morning and sometimes in the evening? A. Yes.

Q. Was Joan there each time you were there?

A. Not always.

Q. Didn't you say the reason for your going to work was [99] to substitute for Joan when she couldn't be there?

(Testimony of Imogene Pendergrass.)

A. Partially it could have been.

Q. Then she couldn't have been there if you were substituting for her.

A. Not always, but then I didn't substitute for her all the time.

Q. Did she work anywhere else?

A. Well, not that I know definitely.

Q. What do you mean definitely?

A. She may have helped out at the photo lab a little, but a very little, and I wouldn't know any definite dates.

Mr. Lester: I think that is all.

Mr. Wilmer: That is all. The plaintiff rests, your Honor.

Motion For Judgment

Mr. Lester: For the record, I think I might at this time make a brief motion for judgment at this point for the reason that the evidence fails to establish, Number One: That the decedent was an active partner; and Number Two: That even if she were, the evidence fails to show that she was active on a full-time basis; and finally for the third reason: That in any event, the insurance, if there was any in the first instance, became terminated when the evidence shows she left for Stanford and was away for more than 31 days, there being no evidence of any option having been exercised as provided by the policy. [100]

The Court: The motion will be denied.

Mr. Lester: I will call Mr. Don Barrows.

DON BARROWS

called as a witness herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Lester:

Q. Your full name, Mr. Barrows?

A. Donald C. Barrows.

Q. You reside where?

A. I beg your pardon?

Q. Where do you live?

A. I reside in Glendale and work in Cottonwood.

Q. How long have you lived in Glendale?

A. Just three years.

Q. Glendale is approximately how far from Cottonwood?

A. Two and one-half miles.

Q. Do you own a business in Cottonwood?

A. I do.

Q. What is the name of that business?

A. Photo Lab.

Q. Where is that located with reference to the Cottonwood Lumber Company?

A. About three doors south on that street.

Q. On the same side of the street? [101]

A. Yes.

Q. How long have you known the Medigovich family?

A. Three years.

Q. By the way, you received a subpoena, did you not, to appear here?

A. Yes, I did.

Q. That was Mr. Wilmer who subpoenaed you. Do you have that subpoena?

(Testimony of Don Barrows.)

Mr. Wilmer: If the Court please, if counsel is interested, I think the record will show that he issued a subpoena for Mr. Barrows and we issued a subpoena for Mr. Barrows.

Q. When did you first meet Joan Medigovich; when did you first know her?

A. When we purchased the shop in Cottonwood.

Q. When you first came to Cottonwood and Glendale you purchased the photo lab?

A. We worked on it actually before we moved to Cottonwood, but the deal was completed approximately the first of August.

Q. That was August, 1951? A. Yes.

Q. What was the occasion of your coming in contact with Joan Medigovich? How did you meet her?

A. She had been working for the former owner of the shop.

Q. She had been working in the photo lab for the proprietor before you bought it? [102]

A. She had been helping Mr. Blasdale.

Q. When you took over, did that relationship continue; did she continue to work at the photo lab?

A. For I would say probably about a week's time immediately after we purchased the shop.

Q. That was in August, 1951? A. Yes.

Q. Did she ever again work there?

A. Off and on, yes.

Q. I talked with you yesterday about the thing?

A. Yes.

(Testimony of Don Barrows.)

Q. Do you remember what you told me yesterday?

Mr. Wilmer: I object to this type of examination. He called the witness. The question is did he talk with him yesterday.

The Court: Objection sustained.

Q. Did she work for you in 1952?

A. I believe there were a couple of occasions, were times when we called the lumber yard to see if she could come in for an hour or two.

Q. Just a couple of occasions?

A. I beg your pardon?

Q. Just a couple of occasions?

A. Well, it couldn't have been too many in '52 because during the summer our business is naturally slow but I believe [103] the occasions I am referring to was the latter part of '52.

Q. Mr. Barrows, didn't you tell me yesterday in answer to a question by me that she worked nearly every day in 1952 in your business and you paid her by the hour. Didn't you tell me that yesterday?

Mr. Wilmer: Counsel is cross-examining his own witness.

Mr. Lester: I believe I have a right to under the circumstances.

Mr. Wilmer: There is nothing that would indicate that occasion for cross-examining Mr. Barrows. He doesn't appear to be hostile.

Mr. Lester: I believe he does.

The Court: I am going to let it stand. I take it counsel is facing surprise.

(Testimony of Don Barrows.)

Mr. Lester: Yes, I am.

The Court: Read the question.

(The last question was read by the reporter.)

A. If I did, I don't remember because that wouldn't be possible.

Q. Didn't you tell me that during the school, when she was still in high school she would come and report for work at your photo lab almost every day after school?

A. I couldn't have said every day.

Q. Almost every day you told me, isn't that a fact?

A. No, it couldn't be almost every day. [104]

Q. I am not asking what it could have been. I am asking if you didn't tell me that yesterday?

A. I don't remember.

Q. Didn't you tell me that during the summer she worked almost every day at least half a day and divided her time between the lumber yard and your shop?

A. In 1952 after Joan came home from school and came out of the hospital she used to come in around noontime.

Q. I am talking about the summer of 1952 and I will come to later in the year in a few moments.

A. In the summer of '52 and that of lunch hours and possibly an hour or two in the afternoon, but not every day.

Q. But didn't you tell me she did that usually every day?

A. I couldn't have.

Q. Did you?

A. No.

(Testimony of Don Barrows.)

Mr. Wilmer: Counsel has asked the question and the witness has answered.

The Court: It has been answered.

Q. Then she went to Stanford and after she came back she returned to work in the photo lab?

A. She helped out a few times after she came back from Stanford.

Q. Didn't you tell me yesterday she worked almost every day until she went to Phoenix to enroll in the college? [105]

A. I didn't say nearly every day.

Q. You did say nearly every day.

A. I said she was a big help and helped numerous occasions but I didn't say every day.

Mr. Wilmer: I take it she was quite interested in photography? A. Yes, sir, she was.

Mr. Lester: Did she wait on customers while she was there? A. Yes, she did.

The Clerk: Defendant's Exhibit A for identification.

Mr. Lester: I offer in evidence Defendant's Exhibit A for identification, which is a certified photostatic copy of the death certificate.

Mr. Wilmer: No objections. I don't see any point in it. The pleadings admit the issuance of the policy and admit the filing of the claim.

The Court: Isn't that true?

Mr. Lester: Under the law, as I understand it, the facts stated in the death certificate are prima facie evidence of the facts stated therein.

(Testimony of Don Barrows.)

Mr. Wilmer: I still say there is no materiality in it, your Honor.

Mr. Lester: The photostatic copy of the death certificate gives her occupation and her business at the time of her [106] death.

Mr. Wilmer: We certainly object to it that there is any evidence whatsoever of what her occupation was or what her address was at the time of her death. The case which counsel is requesting doesn't go to that extent at all. If that is the purpose of it, we object to it on the ground it is of no evidentiary value.

The Court: It may go in. I will look at it later.

Mr. Lester: I just want to point out the two——

Mr. Wilmer: If this is going to be argued——

Mr. Lester: This is not going to be argued. I am going to read the line in question to save time. I think I have a right.

The Court: Let counsel proceed.

Mr. Lester: Line 9-A which calls for the usual occupation, states the word "student," and under 9-B, which calls for the kind of business or industry, the word "college" appears.

I think the defendant will rest. I have nothing more.

(Discussion as to the submission of the case and the time for submission of [107] memoranda.)

State of Arizona,
County of Pima—ss.

I, Myron O. Stolle, do hereby certify that I am an official Court Reporter in the United States District Court, District of Arizona, and that as such official Court Reporter I attended the trial in the foregoing entitled cause; that I took down in shorthand all the oral testimony adduced and proceedings had; that such shorthand was reduced to writing under my supervision and the foregoing 107 pages of typewritten matter contain a full, true and correct transcript of my shorthand notes taken by me aforesaid.

Witness my hand this 8th day of February, 1955.

/s/ MYRON O. STOLLE,
Official Court Reporter.

[Endorsed]: Filed February 9, 1955. [108]

In the District Court of the United States
for the District of Arizona

CERTIFICATE OF CLERK

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Mattie Edens

Medigovich, Plaintiff, vs. Pacific Mutual Life Insurance Company, a corporation, Defendant, numbered Civil 384 Prescott, on the Docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and the attached and foregoing copy of the Civil Docket entry and minute entry are true and correct copies of the originals thereof remaining in my office in the City of Phoenix, State and District aforesaid.

I further certify that said original documents, and said copy of the Civil Docket entry and of the minute entry, constitute the record on appeal in said case, as designated in the Designation of Contents of Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Plaintiff's Complaint.
2. Petition for Removal and Notice of Removal.
3. Defendant's Answer.
4. Plaintiff's Memorandum.
5. Defendant's Memorandum.
6. Plaintiff's Reply Memorandum.
7. Court order entered December 28, 1954, at Tucson and in the Civil Docket on December 30, 1954, ordering judgment for the defendant and against the plaintiff.
- 7a. Civil Docket entry showing judgment en-

tered on December 30, 1954, for the defendant and against the plaintiff.

8. Notice of Appeal.

9. Reporter's Transcript of Proceedings.

10. Plaintiff's exhibits 1 to 10, inclusive, and Defendant's Exhibit A, in evidence.

11. Designation of Contents of Record on Appeal.

12. Bond on Appeal.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$1.60 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 4th day of March, 1955.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 14682. United States Court of Appeals for the Ninth Circuit. Mattie Edens Medigovich, Appellant, vs. Pacific Mutual Life Insurance Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed March 7, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14682

MATTIE EDENS MEDIGOVICH,
Appellant,
vs.

PACIFIC MUTUAL LIFE INSURANCE COM-
PANY, a Corporation,
Appellee.

CONCISE STATEMENT OF POINTS TO BE
RELIED ON BY APPELLANT ON AP-
PEAL

Appellant herein, Mattie Edens Medigovich, in-
tends to rely upon the following points for reversal
of the judgment of the District Court:

1. The District Court erred in not finding that an acceptance of premiums by the appellee insurer with knowledge of the insured's employment character constituted an estoppel to assert that the status existing at the time of death was not that of employee under the terms of the group policy No. GL-2208 and Certificate No. 266 issued thereunder.

2. The District Court erred in not resolving against the appellee insurer and in favor of the insured the manifest ambiguities created by language of the group policy which purported to apply the relationship, activities and duties of an employer-employee status to that of a partnership-partner status.

3. The District Court erred in not requiring, if it did require, the appellee insurer to sustain its bur-

den of proving that there was a cessation of employment by the insured within the meaning of the group policy.

4. The District Court erred in finding, if it did so find, that there was a complete severance of the relationship of partnership and active partner as between the Cottonwood Lumber Company co-partnership and Joan Medigovich, the insured, on or about September 17, 1952, under the terms of the group policy.

5. The District Court erred in not finding that the insured was at all times, from the effective date of the policy, July 3, 1952, up until the insured's death on January 23, 1952, a full-time employee (partner) temporarily working on a part-time basis within the terms and provisions of the group policy.

6. The District Court erred in finding, if it did so find, that the insured partner could be "laid off" or be granted a "leave of absence" under the provisions of the group policy relating to termination of insurance.

7. The District Court erred in not finding that the insured was at all times, from the effective date of the policy, July 3, 1952, until the insured's death on January 23, 1953, an "active partner" within the terms and provisions of the group policy.

Respectfully submitted,

SNELL & WILMER,

By /s/ MARK WILMER,

Attorneys for Appellant.

[Endorsed]: Filed March 5, 1955.

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